ANGLIA RUSKIN UNIVERSITY FACULTY OF SCIENCE AND TECHNOLOGY

ARE ADJUDICATORS' DECISIONS MADE IN CONSTRUCTION DISPUTES UNDER STATUTORY ADJUDICATION PREDICTABLE AND IF SO TO WHAT EXTENT?

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ABSTRACT

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This research project investigated whether it was possible to reliably predict adjudicators' decisions made under the Housing Grants, Construction and Regeneration Act 1996 (as amended). Anecdotally, many commentators had suggested that such decisions were unpredictable and that led to significant uncertainty in seeking to resolve construction disputes. If adjudicators' decisions could be reliably predicted it is foreseeable that the level of disputes referred to Statutory Adjudication would reduce significantly, saving substantial sums in unrecoverable costs that parties would otherwise incur. It is further foreseeable that the construction industry would refocus resources onto projects and seek to deliver on time, to budget and quality rather than diverting resources to deal with disputes.

The matter was investigated by distributing a Research Questionnaire to adjudicators in order to identify factors that might influence adjudicators in their decision-making and to seek their views as to why decisions might be unpredictable. By considering the current level of knowledge, industry experience and the views of adjudicators, it was possible to identify factors that might impact the predictability of adjudicators' decisions. It was then possible to develop an Explanatory Model followed by a Predictive Model to determine whether decisions could be reliably predicted.

This research found that adjudicators' decisions, based on a sample of 125 previously made decisions, could be reliably predicted. The Predictive Model determined that whether a party would win or lose an adjudication was correctly predicted in 95% of decisions. In terms of the percentage of recovery that a party would achieve, this was correctly predicted in 83% of the decisions.

This research concluded that the evidence supported a high degree of predictability in adjudicators' decisions within the sample. This suggests a significant potential to improve efficiency and reduce the number of disputes in the construction industry.

Key Words: Statutory Adjudication, Construction Disputes, Decision-making, Predictability.

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ABREVIATIONS

ANB – Adjudicator Nominating Body

ARC – Adjudication Reporting Centre

BLR – Building Law Reports

CBR – Case-Based Reasoning

CIArb – Chartered Institute of Arbitrators

CIC – Construction Industry Council

CIOB – Chartered Institute of Building

CILL – Construction Industry Law Letter

Const LJ – Construction Law Journal

Con LR – Construction Law Report

EWHC – High Court of England and Wales

FAE – Fellow of the Academy of Experts

FCIArb – Fellow of the Chartered Institute of Arbitrators

FCIOB – Fellow of the Chartered Institute of Building

FDBF – Fellow of the Dispute Board Federation

FICE – Fellow of the Institution of Civil Engineers

FInstCES – Fellow of the Institution of Civil Engineering Surveyors

FRICS – Fellow of the Royal Institution of Chartered Surveyors

HGCRA 1996 or the Act – Housing Grants, Construction and Regeneration Act 1996

ICE – Institution of Civil Engineers

LDEDCA 2009 – Local Democracy, Economic Development and Construction Act 2009

MAE – Member of the Academy of Experts

MCIArb – Member of the Chartered Institute of Arbitrators

MCIAT – Member of the Chartered Institute of Architectural Technicians

MCICES – Member of the Chartered Institute of Civil Engineering Surveyors

MCIOB – Member of the Chartered Institute of Building

MRICS – Member of the Royal Institution of Chartered Surveyors

ONS – Office of National Statistics

Para – Paragraph

RIBA – Royal Institution of British Architects

RICS – Royal Institution of Chartered Surveyors

TCC – Technology and Construction Court

TCLR – Trinity College Law Review

TECBAR – Technology and Construction Bar Association

TeCSA – Technology and Construction Solicitors' Association

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1 INTRODUCTION

This research seeks to determine whether adjudicators' decisions made in construction disputes under Statutory Adjudication are predictable or not, and if so to what extent they are predictable.

During the late 1980's and early 1990's Parliament realised that the construction industry was beset by disputes. The resolution of such disputes was taking far too long and costing far too much. Lord Wolf, in carrying out his review of time and costs in litigation in 1996 (the 'Wolf Report'), at Annex 3 of his report provided some statistics on the Official Referees Court(s), which is now the Technology and Construction Court. Wolf found that of 205 cases in the Technology and Construction Court, which generally involved construction disputes, the mean duration from the initial instruction of the Claimant to the conclusion of the dispute was a period of 34 months, with a median of 30 months.

Wolf also found that the costs as a percentage of the claim value were on average 158% for claims less than £12,500 and 96% for claims higher than £12,500 but less than £25,000. Furthermore, these costs were not the actual costs incurred by the parties, but the cost the losing party had been order to pay the winning party as a contribution by the Court, i.e. after taxation or Court assessment; in other words, the actual costs incurred would have been higher.

It was clear that there was a significant problem. Parliament followed the advice of Sir Michael Latham (1994) and introduced adjudication as a statutory right by enactment of the Housing Grants, Construction and Regeneration Act 1996. The key driver behind adjudication was Latham's findings that the efficiency and operation of the construction industry was seriously affected by disputes, resulting in higher costs, delays and a high degree of insolvencies in the construction industry.

This statutory right to adjudication was radical; it substantially altered the landscape of construction dispute resolution and changed the culture and performance of the construction industry. It significantly reduced the amount of construction related cases being presented in arbitration and litigation. Both

arbitration and litigation had become too expensive and were taking too long (Elliott, 2009).

The Housing Grants, Construction and Regeneration Act 1996 was Parliament's answer to acute cash flow problems present in the construction industry. It was to provide a temporarily binding, enforceable decision from an independent decision maker in a short time frame. Whilst the parties still had the ability to seek a final determination in arbitration, litigation or by agreement, it was intended that Statutory Adjudication would resolve disputes at least temporarily and keep cash flowing during the construction of projects. An adjudicator's decision is to be complied with until final determination; this meant that cash would flow following the adjudicator's decision. Statutory Adjudication was introduced in order to seek to deal with these difficulties and is regarded to have been successful (Uff, 2012:6). Statutory Adjudication is embedded in the operation of the construction industry and is the means by which most construction disputes are now resolved in the UK.

The Housing Grants, Construction and Regeneration Act 1996 introduced Statutory Adjudication into the United Kingdom in 1998. This Act provided a statutory right for any party to a qualifying construction contract, to refer a dispute to adjudication, at any time, for decision by an independent adjudicator. It was of paramount importance to the success of Statutory Adjudication that the support of the Courts was seen to be clear and unequivocal to ensure that the process worked effectively (Riches and Dancaster, 2004:4). The Court recognised the will of Parliament for a 'quick and dirty fix' for construction disputes in the first enforcement case to come before the Technology and Construction Court. Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93, Dyson J enforced the decision of the adjudicator. Thereafter, the courts largely rapidly enforced adjudication decisions and the utilisation of Statutory Adjudication increased significantly (Kennedy and Milligan, 2010). The users of the Statutory Adjudication process saw that the Court was keen to support the will of Parliament.

Whilst utilisation of Statutory Adjudication continued to increase, there were concerns expressed by the construction industry and practising adjudicators as to the quality of adjudicators (Bingham, 2004), the unpredictable nature of the decisions and the limitations or appropriateness of the process (Bessey, 2002).

A number of adjudication decisions were referred to the Court; whilst the vast majority of adjudicators' decisions were enforced, some were not. In the meantime, concerns continued to be expressed about the decisions being rendered by adjudicators, even though the Court would ordinarily enforce an adjudicator's decision even if it were wrong (Bouygues (UK) Ltd v. Dahl Jensen UK Ltd [2000] BLR 522).

Whilst Statutory Adjudication was always intended to be temporarily binding it was apparent that many parties were taking the decision to be final (Kirkham, 2004 and Elliott, 2008). It was mooted that the main reason for this was that when the parties had been through the process of Statutory Adjudication they would not wish to take further proceedings (Hamilton, 2011), regardless of whether or not they were satisfied with the adjudicator's decision (Kirkham, 2004). This reinforced the need for good quality decisions by adjudicators and placed a greater emphasis on the decision of whether to seek Statutory Adjudication or not.

Concerns continued and many asserted that adjudicators' decisions were unpredictable. A number of factors were mooted as the reasons why this might be the case, these included the quality of the adjudicator (Bingham, 2011), the limitations of the process, the subject matter and level of complexity of the dispute (Franklin, 2005), the representatives involved and the quality of submissions by the parties (Entwistle, 2012). However, such assertions were generally anecdotal.

During the initial period of its operation, Parliament had observed certain difficulties with the process of Statutory Adjudication with regard to how the construction industry was operating. Parliament also took note of the judgments of the Court in respect of whether or not to enforce the decision of adjudicators. That led to new legislation, The Local Democracy, Economic Development and Construction Act 2009, which became effective in 2011. It made some amendments to the Housing Grants, Construction and Regeneration Act 1996, however instead of creating greater certainty, it arguably added to the unpredictability of adjudicators' decisions, insomuch that part verbal or wholly verbal contracts could now also be referred to Statutory Adjudication. The evidential burden and its need for consideration by the adjudicator, perhaps in the absence of a hearing, potentially added to the complexity and

predictability issues that had manifest themselves in Statutory Adjudication (Entwistle, 2012).

The need to determine the predictability of Statutory Adjudication has become increasingly important to the parties with a potential construction dispute. If Statutory Adjudication decisions could be reliably predicted, the parties would have the ability to use that knowledge to decide whether to initiate an adjudication or not, or how to respond to an adjudication. It would enable them to avoid unnecessary expenditure of significant resources. Without predictability, a party may seek to refer a dispute to a more predictable forum; parties may decide whether or not to pursue or defend adjudication proceedings and how they might best present or defend submissions to maximise their level of success.

1.1 RESEARCH AIM

The aim of this research is to determine whether adjudicators' decisions made in construction disputes under Statutory Adjudication are predictable or not, and if so to what extent they are predictable.

1.2 RESEARCH QUESTION

Are adjudicators' decisions made in construction disputes under Statutory Adjudication predictable and if so to what extent are they predictable?

1.3 RESEARCH OBJECTIVES

This research seeks to achieve the following objectives:

1. To conduct a detailed Literature Review to establish the current level of knowledge in relation to:
   a) Statutory Adjudication;
   b) Predicting decisions in formal construction dispute resolution and particularly Statutory Adjudication;
   c) Factors that might influence decisions in formal construction dispute resolution; and
   d) Previous research undertaken in regard to Statutory Adjudication.

2. To define Statutory Adjudication as a widely accepted definition does not currently exist.
3. To define the process of Statutory Adjudication, analyse the same and then seek to identify the factors from the process that might impact adjudicators' decisions.
4. To identify factors from the Process, the Decision Maker (the Person), the Dispute and the Parties or their Representatives that might influence decision-making and then weight them in order to present an Explanatory then Predictive Model.
5. To run the Predictive Model to establish whether adjudicators' decisions can be reliably predicted and report the findings.
6. To form conclusions and make recommendations resultant of the research.

1.4 IMPACT OF THE RESEARCH

The research has the potential to impact significantly upon construction dispute resolution tactics and the choice of dispute resolution forum for the UK construction industry. It could potentially save significant resources, many of which are currently expended on a continuous basis in construction dispute resolution. Significant sums are expended on tactics approaching or during adjudication; a party may seek to disrupt the process by claiming that the adjudicator does not have jurisdiction, whether valid or not, and resources are diverted to deal with such matters. A party may call in experts to offer opinion; this can add significantly to unrecoverable party costs. A party may seek to avoid an adjudicator's decision and whilst that is generally unlikely to be successful, it further adds to the costs involved.

The choice of forum is also very important. If Statutory Adjudication can be reliably predicted then it would likely be the forum of choice, due to its time and consequent cost benefits. However, if the opposite is true then a party with a strong case might pursue an arguably more predictable, but more expensive and time consuming alternative forum, such as litigation or arbitration, the significant benefit being that if a party is successful in either arbitration or litigation then costs usually follow the event and generally are, to a significant degree, recoverable. Therefore the losing party can end up paying significant costs, its own and that of the winning party or proportions

thereof. If a party objectively considers it has a weaker case it might prefer a more unpredictable forum in pursuit of a settlement or an unpredictable decision that might be in its favour despite the lack of strength in its case.

Further, wider impacts are foreseeable including:

1.4.1 Minimising Disruption on Projects and Improving Completion Times and Certainty

If Statutory Adjudication decisions could be reliably predicted it is foreseeable that the focus on projects would be delivery, delivering on time, to quality and safely. The amount of human resources required to engage in adjudication are significant and they are typically largely sourced from the project team, with a significant impact upon the project budget. This creates disruption, as the project team are no longer entirely focused on their day to day activities. If predictability was determined, it could potentially limit or avoid disruption and foreseeably improve completion times for important construction projects. Predictability of decisions would also promote certainty, certainty of delivery and commercial certainty. It would enable the establishment of liabilities and direct exposure to risk.

1.4.2 Change the Culture of the Construction Industry

The impact of this research could also possibly extend to changing the culture of the construction industry, reducing its confrontational nature and inducing it to become more cooperative and opting for more commercially advantageous strategies as the predictability of dispute indicates that to be the best commercial solution. The need for a less confrontational construction industry has been mooted for many years. The introduction of Statutory Adjudication arguably generated more disputes as the statutory right is available and commercially accessible, whereas litigation and arbitration were often beyond reach. If decisions could be reliably predicted then unnecessary confrontation would be meritless.

As the construction industry is typically 6% of GDP (ONS 2017) then reducing confrontation and promptly dealing with predictable disputes would in turn likely improve the performance of the construction industry and therefore could further potentially benefit the wider economy.

This research will be of significant benefit to parties to a construction dispute in determining their dispute resolution strategy. This research will contribute significantly to what is currently known about decision-making by adjudicators facilitating Statutory Adjudication.

1.5 LIMITATIONS

This research was subject to the following limitations:

The enabling legislation that provides for Statutory Adjudication only covers the UK and therefore, whilst adjudication in various forms does exist in other jurisdictions, no international projects were considered.

The number of actively practising adjudicators is actually quite small (circa 100) and this limited the number of questionnaires that could be distributed. Adjudicators also tend to be very busy dispute resolution professionals; some also practice as industry professionals, lawyers and/or arbitrators for example. This placed some limit on the return and timing of questionnaires, albeit overall the level of participation was reasonably good.

Statutory Adjudication is a private process, which in contrast to litigation for example means that decisions are not in the public domain, whereas in case of litigation, they are in judgments resulting from litigation. This rendered decisions of adjudicators difficult to source and significant effort had to be expended in securing agreement for the provision of decisions for this research to be conducted. Whilst 125 decisions were collected, as there are typically in excess of a thousand adjudications each year this is still a small but representative sample upon which to base testing. Additional resources would have enabled further testing and is a consideration for the future.

2 METHODOLOGY

2.1 METHODOLOGY

This methodology sets out the processes followed in order to conduct this structured and comprehensive research project. The methodology pursued is displayed in Figure 2.1 below:

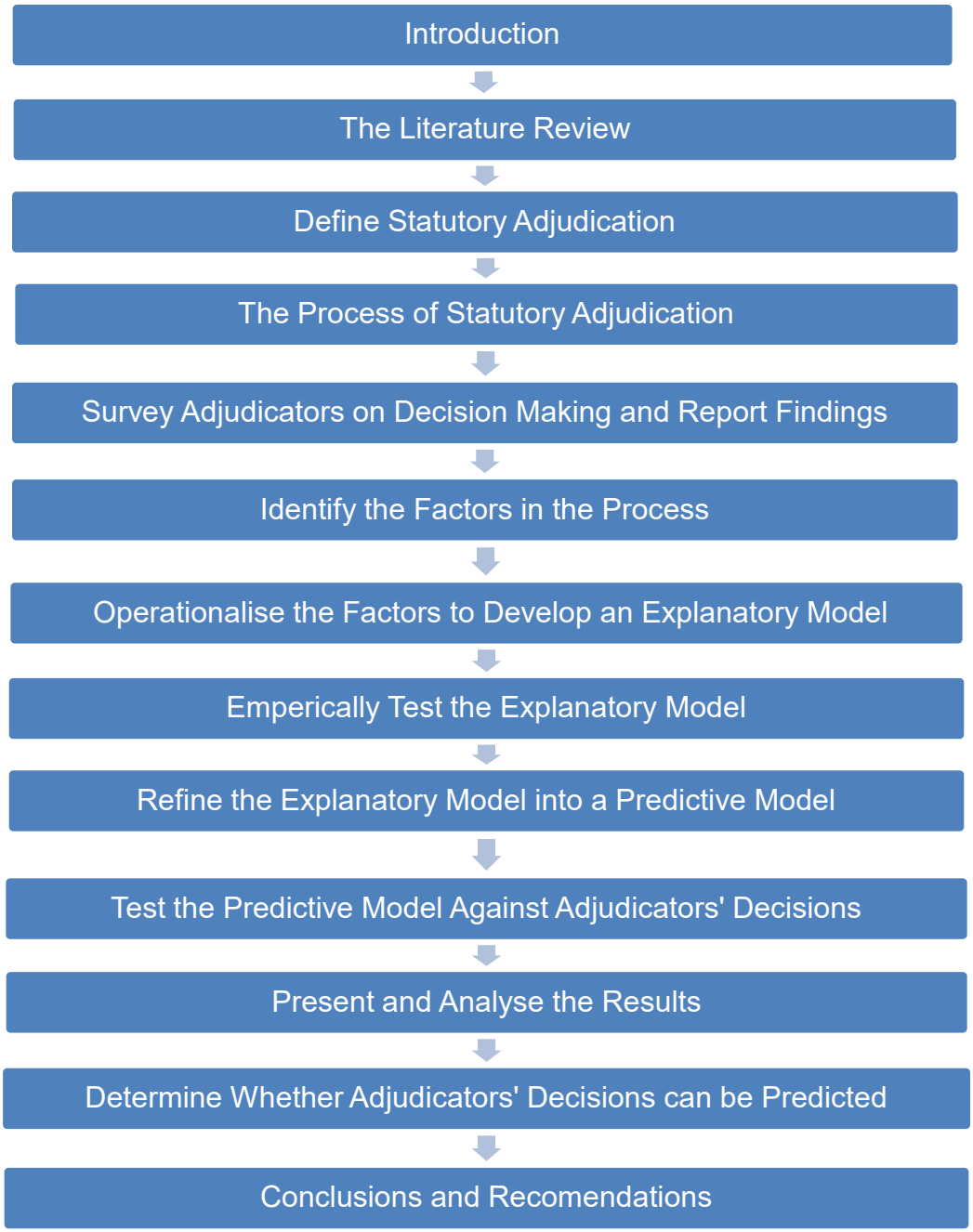

Figure 2.1 Methodology

2.2 INTRODUCTION

The Introduction places the research into context and sets out the research aim, research objectives, the research question and it sets out the likely impact of the research.

2.3 THE LITERATURE REVIEW

The Literature Review aims to establish the following:

1. The current knowledge with regard to the evolution and development of what is currently known about Statutory Adjudication and Decision-Making by adjudicators;

2. The current knowledge with regard to what is currently known about predicting decisions in formal construction dispute resolution and particularly Statutory Adjudication;

3. The current knowledge with regard to what is currently known about factors that might influence decisions in formal construction dispute resolution and particularly Statutory Adjudication; and

4. Identify what previous research has been undertaken in regard to Statutory Adjudication.

2.4 DEFINE STATUTORY ADJUDICATION

It is perhaps somewhat surprising that legislation had not taken the opportunity to define Statutory Adjudication. However, this research project was able to establish by reference to the legislation and published text that no widely accepted definition of Statutory Adjudication exists (Coulson, 2007). This omission in the available body of knowledge was criticised by many learned writers. Examples include Riches and Dancaster (2004) and a member of the judiciary, who had actively published work to identify the same deficiency (Coulson, 2011).

Arriving at a well-considered definition was time consuming and that in itself perhaps accounted for some of the reluctance to propose and establish a widely accepted definition of Statutory Adjudication.

In order to offer a definition of Statutory Adjudication as an integral part of this research project it was necessary to comprehensively identify and research the integral parts that formulate and are contained within Statutory Adjudication, these included:

1. The legal basis of Statutory Adjudication;
2. The timing and time frame;
3. The temporary nature of the enforceable decision;
4. The independent nature of the decision maker;
5. The requirements for a valid and enforceable decision; and
6. The anticipated support of the Court.

Once such integral parts were properly understood it was possible to prepare a well-founded definition of Statutory Adjudication in order to add to the available body of knowledge and place this research firmly into context.

2.5 THE PROCESS OF STATUTORY ADJUDICATION

Once it was possible to define Statutory Adjudication, it was necessary to define the process of Statutory Adjudication. This was of paramount importance as the process needed to be fully understood as this would likely impact ultimately on decision-making by adjudicators. This chapter also further places this research project firmly into context. The process of Statutory Adjudication is driven by a number of factors that will impact the predictability of a decision.

Defining the process of Statutory Adjudication required detailed research in regard to legislation and the Scheme for Construction Contracts, processes ordinarily adopted by adjudicators and influences that parties might have in regard to the Statutory Adjudication process.

2.6 SURVEY ADJUDICATORS ON DECISION-MAKING AND REPORT FINDINGS

Once Statutory Adjudication and the process had been defined with potential factors identified and extracted an informed Research Questionnaire could be developed. This enabled collection of data from practicing adjudicators and further requested their views as to why some commentators suggest that

decisions are unpredictable. The results to direct questions were quite varied, suggesting that a sample of adjudicators do not generally agree on a number of matters. However, of particular interest was the rationales offered by adjudicators in relation to why decisions might be unpredictable. There was some correlation here, which as the sample are directly making such decisions, further informed identifying factors and the development of the models. In consequence, such work was valuable to this research project.

2.7 IDENTIFY THE FACTORS IN THE PROCESS

Following on from the above tasks, a number of factors were identified as likely to potentially influence decision-making by adjudicators; such factors fell into the following categories:

A. The Process and Time Scales Association with the Process
B. The Person – The Decision Maker
C. The Dispute
D. The Parties or their Representatives

Such factors gave rise to a number of questions under each category, such questions could be answered by reference to previously made adjudicators' decisions.

2.8 OPERATIONALISE THE FACTORS TO DEVELOP AN EXPLANATORY MODEL

With the factors identified and posed into relevant questions it was possible to develop an Explanatory Model. This required the development of a model that would weigh factors arising directly from the questions in order to establish whether the referring or responding party would win or lose and further whether the level of recovery in the adjudication could be predicted.

2.9 EMPIRICALLY TEST THE EXPLANATORY MODEL

The Explanatory Model was tested by applying factors contained within questions and weighting them in order to seek to predict 50 previously made decisions of adjudicators.

2.10 REFINE THE EXPLANATORY MODEL INTO A PREDICTIVE MODEL

The Explanatory Model was then reviewed and refined into a Predictive Model by reviewing the results from the testing of the Explanatory Model.

2.11 TEST THE PREDICTIVE MODEL AGAINST ADJUDICATORS' DECISIONS

The Predictive Model was then applied to an additional 75 adjudicators' decisions in order to establish whether the decisions could be reliably predicted.

2.12 PRESENT AND ANALYSE THE RESULTS

The results are presented to demonstrate the degree to which the Predictive Model was able to predict the outcome of decisions already made by adjudicators.

2.13 DETERMINE WHETHER ADJUICATORS' DECISIONS CAN BE RELIABLY PREDICTED

The Research Question to be addressed by this research project was:

Are adjudicators' decisions made in construction disputes under Statutory Adjudication predictable and if so to what extent?

This research determined whether adjudicators' decisions could be reliably predicted by application of relevant factors to a Predictive Model.

2.14 CONCLUSIONS AND RECOMMENDATIONS

Conclusions are formed as to whether adjudicators' decisions could be predicted and if so to what extent and to what level of reliability. Recommendations are made, particularly regarding further research.

2.15 ETHICAL CONSIDERATIONS

Ethical considerations required detailed consideration in adopting the aforementioned methodology. Whilst previously made decisions of adjudicators

were provided to the researcher all of the providers required that such decisions were kept secure and on a confidential basis and further required that such decisions were destroyed after data collection. Much the same can be said in relation to the questionnaire sent to adjudicators. Such questionnaires were completed without identification of the participate being disclosed, they were then destroyed after data collection. The research project was granted ethics approval by the University Ethics Committee.

2.16 METHODOLOGY SELECTION

The methodology selected for data collection was questionnaire based followed by observation of previously rendered decisions of adjudicators. This methodology was selected as questionnaires are cost effective and efficient for collecting a wider supply of data. Further, the data provided was relatively simple to analyse and the information anticipated would arise from straight forward questions. Observation of previously made decisions followed and whilst previously made decisions could be lengthy the data collection exercise was reasonably straightforward. Contrast with other research methods this approach was considered the most appropriate as set out in the comparison table below:

Table 2.1 Comparison of research methods

Research Method	Advantages	Disadvantages	Observations
Experimental Research	Utilising comparison groups gives accurate cause and effect results across the sample.	Can lead to inaccurate conclusions based only on comparison groups that may not represent the population.	A research method commonly used in medical research. Can have significant ethical challenges. Not suitable for this research as it considers previously made decisions.

Case Studies	Facilitates in depth investigation into a particular previous matter.	Specific to a particular matter only and therefore difficult to generalise findings on a robust basis as a generalisation from such a limited sample.	Whilst a case study of one (or a small number) decision(s) would have been interesting in relation to this research it would not have generated sufficient reliable data to determine predictability of adjudicators' decisions.
Questionnaires, /interviews and observation	Well designed questionnaires produce sets of data that are easy to analyse. Also benefits by providing facts and opinions of subjects. Questionnaires are an economic means of data collection across a larger sample (Naoum 1998). Interviews can provide focused insight.	Questionnaires should be brief to encourage completion and generally only provide brief and straightforward data. Interviews can be time consuming and expensive, they only provide data from a small sample (Naoum 1998) and are difficult to secure.	Questionnaires were deployed as a well designed questionnaire produced both facts and opinions that were relatively easy to analyse. Observation was also deployed in relation to previously made decisions as factors relevant to predictability could be

	Observation of events is contemporary.	Observation can be equally difficult to secure.	observed from those decisions.
Action Research	Allows for the monitoring of change in practice. It is therefore practical and involves observing individuals or groups in situations.	Can have ethical challenges. Is observational so does not allow for adjustment of variables.	Would not be suitable for this research as monitoring decision-making by an adjudicator would not be possible.

Table 2.1 Comparison of research methods

3 LITERATURE REVIEW

3.1 THE EVOLUTION AND DEVELOPMENT OF STATUTORY ADJUDICATION

The origin and commencement of the evolution of Statutory Adjudication can be traced back to an announcement in the House of Commons on 5 July 1993, that there was to be a joint Review of Procurement and Contractual Arrangement in the UK Construction Industry by the Department of the Environment, supported by industry groups representing clients. The Review led to Sir Michael Latham published his final report entitled 'Constructing the Team' in 1994 (Latham, 1994), better known as 'the Latham Report'.

The Latham Report dealt with a wide range of issues in construction and included a number of recommendations. Two in particular were significant and radical; the first was a requirement for payment provisions and the second was a mandatory dispute resolution mechanism, which is now known as Statutory Adjudication.

Latham identified that the construction industry was poorly performing and that one of the main reasons was the adversarial culture of the industry, which resulted in unnecessary delays, additional costs and poor customer value and satisfaction, but he accepted that a certain number of disputes were inevitable. He observed that significant sums of money and time were being spent on formal dispute resolution in the construction industry. This led to the recommendation that adjudication would be a better method to resolve disputes, even though the Report maintained that the best solution was to modernise the operation of the industry to avoid disputes.

The Latham Report recommended that adjudication could be used for any size of dispute. It also concluded that a decision reached by an adjudicator should not be final, that the adjudicator should be named in the contract or appointed by appropriate nominating bodies and that the courts should only be approached as a last resort and only after Practical Completion.

Debates in both the House of Commons and the House of Lords seemed to suggest that parties would want their dispute resolved by adjudication up to Practical Completion. Seemingly assuming that parties would use adjudication

as and when disputes arose, they would then decide at the end of the project whether they wanted a full case review and a final decision by way of litigation or arbitration. There was also concern about the fact that there was no limit on the sums that could be adjudicated and settled in 28 days, and that the Government's proposals were moving away from Latham's original proposals. Those that supported the Bill were seemingly confident that adjudication would provide a quick, cost effective and impartial resolution to a dispute and let the contracted work continue. The Bill also provided that adjudication would be available as a statutory right and accordingly, once the legislation was enacted, the term Statutory Adjudication would be created.

The resulting Statutory Adjudication, although slightly altered from that recommended by Latham, produced a quick, cost effective method of resolving construction disputes by an impartial person, leading to a temporarily binding decision. The recommendations of Latham had developed and evolved into a statutory construction, dispute resolution tool that is arguably very successful. However, there has been criticism and challenges to Statutory Adjudication, which are considered within this Literature Review.

3.1.1 Is Statutory Adjudication Satisfactory and why was it necessary?

Forbes (2001) delivered a paper within which he considered the first few years of Statutory Adjudication. Forbes noted that there was earlier work, which indicated that there was a significant degree of dissatisfaction with Statutory Adjudication. Albeit, he did note that the Construction Industry Board, which considered that Statutory Adjudication had generally been positive and beneficial, had tabled an opposite view.

Notwithstanding such views, the adoption of Statutory Adjudication by the construction industry has been significant. Uff (2012:6) simply stated that *'…adjudication has proved so successful…'* and this would appear to imply dissatisfaction with other more costly and time consuming methods of formal dispute resolution for construction such as arbitration and litigation. It had been noted that arbitration could be as costly and time consuming as litigation (Riches and Dancaster (1999:11), and Fletcher (2012) considered that the perception is that arbitration is too expensive and takes too long and without effective management by tribunals, arbitration can easily be as perceived. Elliott (2009) simply groups both arbitration and litigation and describes them

as often criticised as being slow, very expensive and jaundice like, albeit Bingham (2010) argues that arbitration is a far more satisfactory method of dispute resolution.

The evidence suggests that parties prefer the prescriptive approach of Statutory Adjudication as set out by Parliament under the Housing Grants, Construction and Regeneration Act 1996 (as amended) rather than arbitration. Perhaps Statutory Adjudication is attractive to a party that simply wants a decision, at the earliest possible opportunity.

During the early operation of Statutory Adjudication there was reported dissatisfaction with Statutory Adjudication but generally commentators who have passed comment more recently (within the last 5 years or so) have considered it at least satisfactory or in most instances, successful. It is also notable that very few complaints against adjudicators are actually upheld (Kennedy and Milligan, 2010).

3.1.2 Specific Matters Particular to the Evolution and Development of Statutory Adjudication

For the purposes of clarity specific selected matters particular to the evolution and development of Statutory Adjudication are considered under separate headings below:

3.1.3 Ambush and At Any Time

Whilst Ambush and At Any Time are closely linked, they are considered in turn below:

3.1.4 Ambush

Statutory Adjudication was challenged as unfair and contrary to principles of law on the basis that it could be used to ‘ambush’ one party to the contract. Eaton (1998) stated that the party who receives a Notice of Adjudication might be unaware that it was coming and may be ambushed at an inconvenient time. Ambush is possible as Section 108 (2) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) provides that a party can refer a dispute to Statutory Adjudication at any time. However, case law has determined that ambush is unlikely in itself to be a defence to enforcement of an adjudicator’s decision (Austin Hall Building Ltd v. Buckland Securities Ltd [2001] BLR 272, CIB Properties Ltd v. Birse

Construction [2005] 1 WLR and Bovis Lend Lease Ltd v. Trustees of London Clinic [2009] EWHC 64 (TCC). '*The mere fact that there has been an "ambush" by the claiming party in an adjudication does not in itself amount to procedural unfairness.'* (see London & Amsterdam Properties Ltd v Waterman Partnership Ltd [2003] EWHC 3059 (TCC) at paragraph 179).

The Court enforced all of the decisions of the adjudicators noted in the cases above, despite claims of ambush.

The current position is that the process of Statutory Adjudication accepts that ambush is possible and permissible by legislation and is accepted by the courts as a hazard of the process. Statutory Adjudication has arguably developed into something that might be unfair, but is nonetheless permissible.

3.1.5 At Any Time

The issue of referring a dispute to Statutory Adjudication at any time has been challenged and the position resolved by the Court. One of the fundamental principles of Statutory Adjudication as set out at Section 108 (2) (a) of the Housing Grants, Construction and Regeneration Act 1996 is that a party may refer a dispute to adjudication at any time. The Courts were asked to interpret this seemingly plain meaning for the first time in Herschel Engineering v. Breen Property Limited [2000] BLR 272. Herschel had already litigated against Breen for payment of its invoices, and Herschel had been successful at first instance in litigation, but Breen had managed to get the judgment set aside. Herschel had set down a notice of appeal and a date for that to be heard was set. However, at the same time as the notice of appeal, Herschel had referred the dispute to Statutory Adjudication. Breen sought an injunction to prevent Herschel from proceeding in adjudication as litigation was being pursued. Dyson J refused the injunction concluding that a party could adjudicate whilst litigation was in progress.

Dyson J. concluded that *'at any time'* meant exactly that. A dispute could be referred to Statutory Adjudication at any time.

Statutory Adjudication as a non-extinguishable right, to refer a dispute at any time, has been supported by the courts on numerous occasions, from an early stage in the Statutory Adjudication legislation; examples include A & D Maintenance and Construction Ltd v. Pagehurst Construction Services Ltd

[1999] CILL 1518 (TCC), Herschel Engineering Ltd v. Breen Properties Ltd [2000] BLR 272 and Christiani & Nelson Ltd v. The Lowry Centre Development Co Limited [2004] TCLR 2. The courts further confirmed that whilst there is a statutory right to adjudicate at any time it is not however an obligation; that is to say that the parties might chose to litigate or agree to arbitrate instead or even at the same time as adjudicating the dispute.

The fact that the right to adjudicate at any time was not an obligation was reconfirmed in Cubitt Building & Interiors Ltd v. Richardson Roofing (Industrial) Ltd [2008] BLR 354 (TCC). Further, as a statutory right the availability of Statutory Adjudication could not be contracted out of by either party (Cummins, 2008).

The current position confirms that a party to a construction contract covered by the Housing Grants, Construction and Regeneration Act 1996 (as amended) can refer a dispute to Statutory Adjudication at any time. However, there are some limited exceptions that have emerged.

'at any time' still has to comply with the Limitation Act 1980 i.e. that an action founded on a simple contract shall not be brought after the expiration of six years, from the date on which the cause of action accrued; or for twelve years from the date on which the cause of action accrued, if the contract is under seal (a deed).

Other examples of limitation as to the meaning of *'at any time'* may be found within the parties' contract, where a certain period provides, for example, a certificate being conclusive evidence of a final and binding decision. An example of such is the final certificate under a JCT contract, which generally constitutes that all sums due to the contractor are to be paid and that cannot be challenged beyond a certain period stated in the contract.

Notwithstanding the above, it is clear that a party may bring an adjudication 'at any time' so long as it is within the limitation period provided by statute or otherwise. Or rather, one might suggest that at any time does not actually literally mean at any time.

Accordingly, the current level of knowledge, established by the development of Statutory Adjudication, directs that a party may refer a dispute to Statutory Adjudication at any time, even concurrent with litigation, arbitration or

mediation for example, except where the contract determines otherwise or where the limitation period has been exceeded.

3.1.6 Complex Disputes

When Eaton (1998) published his work it would seem that at that time Eaton, as did the construction industry, considered that adjudicators would decide relatively simple disputes; and further whilst it would be necessary to apply the contract it was considered that there would not be a need to consider complex legal arguments and in consequence lawyers would not be significantly deployed. In fact, when the Scheme for Construction Contracts Regulations was drafted to support Statutory Adjudication there was much discussion as to whether the parties should be specifically prohibited from being legally represented in any adjudication process. In the event, it was concluded that this was not practicable; nevertheless, that was the trend of industry thinking (Minogue, 2011).

The early work of Eaton (1998) is in stark contrast as to where Statutory Adjudication rests today, as can be seen from case law such as CIB Properties Ltd v. Birse Construction [2004] EWHC 2365 and Amec Group Ltd v. Thames Water Utilities Ltd [2010] EWHC 419. Statutory Adjudication has been utilised for highly complex matters that are in fact far from simple and the decisions of adjudicators acting in such complex disputes have been enforced by the courts.

Decided cases have contributed to the level of understanding with regard to the consideration of complex disputes within Statutory Adjudication. The Court referred to the matter of a dispute allegedly being too complex for Statutory Adjudication in AWG Construction Services Ltd v. Rockingham Motor Speedway Ltd [2004] EWHC 888 (TCC). Toulmin J. raised the possibility that there may be disputes that are so complex, and the advantages so weighted against a Defendant, that there was a conflict between the adjudicator's duty to provide a decision and his duty to act impartially. Enforcement of the adjudicator's decision was declined by Toulmin J., but on other grounds, in this particular instance (Coulson, 2011:336). The Judgment did suggest that Toulmin J. was at that time, uncomfortable with highly complex disputes being referred to Statutory Adjudication.

Toulmin J returned to the matter of a dispute being allegedly too complex in CIB Properties Ltd v. Birse Construction Ltd [2005] 1 WLR 2252 and concluded that his earlier view expressed in AWG Construction Services Ltd v. Rockingham Motor Speedway Ltd [2004] EWHC 888 (TCC) was erroneous (Coulson 2011:337). Toulmin J. added to the then available knowledge by forming the view that the test was not whether the dispute was too complicated to refer to Statutory Adjudication, but whether the adjudicator was able to reach a fair decision within the time allowed.

By reference to the facts of this case, Toulmin J. concluded that in this case the adjudicator had had the time to conclude a fair decision. Rawley *et al* 2013 note that this established that there is no limit to the complexity of a dispute that can be referred to Statutory Adjudication.

In The Dorchester Hotel Ltd v. Vivid Interiors Ltd [2009] EWHC 70 (TCC) the adjudicator formed the view that whilst the matter was complex and large he could reach a proper decision in the time made available to him. In that instance the Court concluded that in such circumstances whereby the adjudicator had expressed such a view, then the Court would accept that, save in the most obvious of cases where it could be plainly demonstrated that it was not the case.

Coulson J added further to the level of understanding with regard to complex disputes and Statutory Adjudication in AMEC Group Limited v. Thames Water Utilities [2010] EWHC 419 (TCC) whereby he concluded it did not matter whether the dispute was large or complex as long as the adjudicator was satisfied he/she could perform broad justice that was sufficient.

As adjudication has developed by testing before the Court, the current level of understanding directs that the aforementioned cases would appear to suggest that as long as the adjudicator had considered the submissions by both parties and felt that he/she could justly decide the dispute in the time available, then the Court would support such a decision. If that is not the case then the adjudicator should resign (Rawley *et al* 2013:331) but the Court will only not enforce a decision in the plainest of cases. The current level of understanding has been established and it is clear that the ‘too complex’ argument was very unlikely to succeed in attempting to resist enforcement of an adjudicator’s decision.

3.1.7 Decisions are Temporarily Binding but Often Final

Section 108 (3) of the Housing Grants, Construction and Regeneration Act 1996 requires a construction contract to provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, arbitration or by agreement between the parties.

The Scheme also provides at 23 (2) that *'The Decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration) or the parties otherwise agree to arbitration) or by agreement between the parties.'*

The House of Lords, during its report stage, considered the nature and intention of Statutory Adjudication. Lord Ackner stated *'What I have always understood by the adjudication process was a quick, enforceable, interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of 'pay now - argue later', which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts.'* Much of what Lord Ackner had said has carried through to the present. The courts have generally keenly enforced 'pay now - argue later' (Examples include Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93 and RWE Npower Plc v. Alstom Power Ltd [2010] EWHC 3061 (TCC)) providing the adjudicator's decision was valid. Adjudications are generally quick with enforceable decisions reached. Whilst the decisions are interim or more commonly referred to as temporarily binding, the adoption of them by industry as final is apparent and that is considered further below.

Judge Francis Kirkham (2004) subsequently commented on the words of Lord Ackner and concluded that Ackner's words reflected the way in which Statutory Adjudication was generally regarded when it was first introduced. She summarised by considering that Statutory Adjudication was described as 'quick and dirty, but temporary'. However, Kirkham expanded to observe that the scenario had moved on noting that parties had seen that adjudication could be commenced at any time. The pay now - argue later approach, which Lord Ackner described, appears to have been overtaken, as adjudication is

now a mainstream post-contract method of dispute resolution. Kirkham (2004) concluded *'As I understand it, in many cases, following the adjudicator's decision, the parties will live with the decision…'* Kirkham had identified at a quite early stage, that whilst in theory an adjudicator's decision is temporary (Section 108 (3) The Housing Grants, Construction and Regeneration Act 1996) such decisions often ended up being final, as the parties do not pursue the matter further.

To summarise the progression of adjudication, Bailey (2008) commented that *'Adjudication has become a popular and accepted form of dispute resolution encouraged by the courts, adopted by many as a way of resolving disputes both interim and final, and extending far beyond the original aim of its authors.'* Again, it was considered that Statutory Adjudication may well be applied as a final means of dispute resolution. This would seem to render the requirement for knowledge in relation to decision-making by adjudicators even more important.

One might suggest that the objectives of Statutory Adjudication have been met. What is now available is the intended potential to resolve construction disputes during the currency of a project (or after) in a timely and reasonably cost efficient fashion. The decision of the adjudicator will be temporarily binding. However, by choice of the construction industry, it is the case that Statutory Adjudication is being utilised to finally determine construction disputes.

Accordingly, as adjudication has developed it is now known that whilst Statutory Adjudication, in accord with legislation, is temporarily binding, it is often a final determination of the dispute.

3.1.8 Wrong Decisions

In 2000, The Court of Appeal went further to support Statutory Adjudication and enforced an adjudicator's decision which was mathematically wrong on the face of it (Bouygues (UK) Ltd v. Dahl Jensen UK Ltd [2000] BLR 522). Dyson J said simply *'If he* (the adjudicator) *has answered the right question in the wrong way, his decision will be binding, if he has answered the wrong question, his decision will be a nullity.'* It was observed that even if an adjudicator had erred in his/her decision, provided he/she had answered the question put to him/her it would be enforced by the courts. If one contrasts

this case with the judgment in Macob Civil Engineering v. Morrison Construction Ltd [1999] BLR 93 it can be seen that the Court seemed to accept that some errors would occur *'...and* (were) *likely to result in injustice. Parliament must be taken to have been aware of this.'* This would appear to be justified by the fact that the decision of the adjudicator is temporarily binding, as later the judgment identifies that *'...Parliament has not abolished arbitration or litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process.'* Constable (2005) noted the risk of injustice and the interim nature of Statutory Adjudication and considered that *'...Courts are happy that, in the short term at least, truth is potentially sacrificed on the altar of cost and time*.'

Another important case was presented to the Court of Appeal in 2002. It was again to follow the principles set down in Bouygues (UK) Ltd v. Dahl Jensen UK Ltd [2000] BLR 522 and support Statutory Adjudication. Sir Michael Murray-Smith stated *'It is important that the enforcement of an adjudicator's decision by summary judgment should not be prevented by arguments that the adjudicator has made errors of law in reaching his decision…the adjudicator's decision, albeit he may have made errors of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination.'* (C & B Scene Concept Designs Ltd v. Isobars Ltd [2002] EWCA Civ 46, Judgment at Para. 30). However, consideration should be applied to the later words of Kirkham in 2004, which observes the practical finality of adjudication as identified earlier in this thesis.

In 2003 Thornton J reconfirmed the position with regard to wrong decisions in which he stated *...If the adjudicator has answered the referred question, even if erroneously or in the wrong way, the resulting decision is both binding and enforceable. If, on the other hand, the adjudicator has answered the wrong question, the resulting decision is a nullity…'* (Joinery Plus Ltd v. Laing Ltd [2003] BLR 184). Albeit, that in this particular instance the adjudicator's decision was not enforced as the adjudicator lacked jurisdiction.

By 2004, Wilcox J was asked to confirm the position with regard to errors made by the adjudicator. In London and Amsterdam Properties v. Waterman Partnership [2004] BLR 179 Wilcox J concluded that errors may be made,

but if the adjudicator has answered the question put to him then that is a valid and enforceable decision.

In 2011 the Court reconfirmed that even if an adjudicator makes a mistake in law in answering the question put to him/her, his/her decision, despite the error will be enforced (Urang Commercial Ltd v. Century Investments Ltd and Anor [2011] EWHC 1561).

The current level of knowledge direct that it would appear clear that as long as the adjudicator answers the question put to him/her and not an alternative question or questions then his/her decision, despite any error of fact or law, will be enforced by the courts. In preparing and amending the relevant legislation that directs Statutory Adjudication, Parliament must have been aware of the possibility of errors and the further possibility of injustice, hence the availability of further final dispute resolution forums provided to determine the dispute afresh if necessary.

3.1.9 The Correction of Slips in Decisions

In 2000, the Court further supported Statutory Adjudication. It was apparent that the supporting legislation was silent as to whether the adjudicator could correct slips that he/she made within the decision. In the case of Bloor Construction (UK) Limited v. Bowmer & Kirkland (London) limited [2000] EWHC 183 (TCC) the adjudicator sent out his decision by fax on the afternoon the decision was due. Bowmer pointed out that there was an error as the adjudicator had failed to take into account payments made on account by Bowmer to Bloor. The adjudicator agreed and issued a corrected decision less than two and a half hours later. Bloor argued that once the adjudicator had issued his decision his role was at an end and therefore the first (incorrect) decision was the decision and that should be enforced. In essence, Bloor suggested that the adjudicator had no power to correct errors or slips. Toulmin J held that in the absence of a specific agreement by the parties to the contrary, a term is to be implied into the construction contract for the adjudicator to have power to correct an error arising from an accidental slip, or omission or to clarify or remove any ambiguity in the decision which he has reached, provided this is done within a reasonable time and without prejudicing the other party. It would appear that the Court was further willing to support Statutory Adjudication, but additionally one might suggest the Court

was also keen to ensure that Bloor did not benefit from the error and one might suggest an attempt at mischief, to the dis-benefit of Statutory Adjudication.

The matter of the slip rule also returned before the Court in 2009. In YCMS Limited (trading as Young Construction Management Services) v. Stephen and Mariam Grabiner [2009] EWHC 127 (TCC). YCMS applied to the Court to enforce an adjudicator's decision by way of summary judgment. There were a number of adjudications between the parties. In the first, the adjudicator found in favour of YCMS but upon receipt of the decision, YCMS notified the adjudicator that he had miscalculated and that in fact a greater sum was due. YCMS had supplied a calculation to demonstrate the point. The adjudicator recalculated and decided that both he and YCMS were wrong and therefore recalculated an even greater sum by an alternative method that had not been suggested before and issued a revised decision. The Grabiners argued, amongst other things, that the revision was not valid. The adjudicator could not revise his decision and that the slip rule was not intended for recalculation purposes. Akenhead J referred to the decision in Bloor Construction (UK) Ltd v. Bowmer and Kirkland (London) Ltd [2000] EWHC 183 (TCC) and then stated as follows:

> *... (b)* (The slip rule) *can and will only relate to "patent errors". A patent error can certainly include the wrong transposition of names or the failing to give credit for sums found to have been paid or simple arithmetical errors.*
>
> *(c) The slip rule cannot be used to enable an adjudicator who has had second thoughts and intentions to correct an award. Thus for example if an adjudicator decides that the law is that there is no equitable right of set off but then changes his mind having read some cases that he has got that wrong, such a change would not be permitted because that would be having second thoughts…*

In this instance Akenhead J considered that the adjudicator had gone further than the correcting of an error and had recalculated on a basis not argued by the parties, therefore a decision could not be enforced.

Towards the end of 2010, the slip rule presented itself before the Court again in Redwing Construction Limited v. Charles Wishart [2010] EWHC 3366 (TCC). In this case, Akenhead J approved the principles set out in the earlier case of YCMS Limited (trading as Young Construction Management Services)

v. Stephen and Mariam Grabiner [2009] EWHC 127 (TCC). He considered that the adjudicator was correcting a patent error and further that he did so in a reasonable time, therefore it was the proper operation of the slip rule and accordingly valid.

In establishing what is currently known about Statutory Adjudication in this regard it would appear clear that the courts were yet again keen to support Statutory Adjudication and in consequence were generally prepared to imply a right to correct slips in the decisions of adjudicators. Parliament have also seen fit to support such a right and have carried this into subsequent legislation. The Local Democracy, Economic Development and Construction Act 2009 and the revised Scheme at Paragraph 22A, albeit that the Scheme requires that (unless the parties agree otherwise in their contract) that any correction under the slip rule must be made within 5 days of the decision. For that reason, it is of paramount importance that the parties act promptly when observing such matters in a decision (PP Construction Limited v. Geoffrey Osborne Limited [2015] EWHC 325 (TCC)).

3.1.10 Severing the Decision

The judgment in Cantillion Construction Ltd v. Urvasco Ltd [2008] EWHC 282 (TCC) was important insofar as it determined, amongst other things, that an adjudicator's decision could be severed; that is to say that if parts of it were valid and enforceable and others invalid, the valid part(s) could be separated from the invalid and enforced by the courts. The Court was prepared to render a decision severable. This was testament to the fact that the courts would support the enforcement of adjudicator's decisions wherever possible. The Court was even prepared to apply this in circumstances whereby the adjudicator had considered more than one dispute, as long as he/she had jurisdiction to determine a dispute. Akenhead J set out a six stage test for severability:

> *'(a) The first step must be to ascertain what dispute or disputes has or have not been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.*
>
> *(b) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute of difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If*

there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.

(c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with other(s).

(d) The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

(e) There is a proviso to (b) and (c) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all-pervading that the remainder of the decision is tainted, the decision will not be enforced.

(f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced.'

The principle points from this 2008 case were revisited, restated and enhanced in the subsequent case of Bovis Lend Lease v. London Clinic [2009] EWHC 64 (TCC). This judgment extended the scope of severability to include 'no dispute' arguments. This scope extension allows one part of an adjudicator's decision untainted by a breach of natural justice to be severed from the other part. This would allow the courts to salvage the remainder of an otherwise enforceable decision (Hembling, 2009). In the aforementioned case Akenhead J also rejected the Defendant's contention that the nature and amount of new material coupled with the timetable amounted to an ambush. As set out earlier in this chapter, ambush is unlikely to work as a defence.

In Working Environments Ltd v. Greencoat Construction Ltd [2012] EWHC 1039 (TCC) it was concluded that where an adjudicator only had jurisdiction to decide part of the dispute, the parts of his decision which were without jurisdiction could be severed from the parts with jurisdiction. Accordingly, the adjudicator's decision was severed and enforced in a reduced sum to reflect the severance.

These cases have added to the current level of knowledge as adjudication has developed, by demonstrating further instances in which the courts have undertaken to substantially support Statutory Adjudication, by allowing the flexibility of severing (providing it is possible and practical to do so) the enforceable from the non-enforceable parts of an adjudicator's decision. This

position has been adopted to prevent the whole adjudication in a particular case being rendered unenforceable.

3.1.11 Further Attempts to Resist Enforcement of the Decision

Choat (2010) added some useful quantum to the understanding of Statutory Adjudication, particularly in light of the number of cases requiring enforcement. Choat reported that over the first ten years of the Housing Grants, Construction and Regeneration Act 1996 in the region of 15,000 adjudications took place with only 5% of those decisions requiring enforcement. Only about 1% of decisions have not been enforced. This demonstrates in quantitative terms the degree of support the courts have given to Statutory Adjudication and suggests further that attempting to resist enforcement of an adjudicator's decision is generally unlikely to be successful.

3.1.12 Natural Justice

The process of Statutory Adjudication is of significant importance and can be of substantial consequence. In a judgment, Bowsher J stated that *'Because there is no appeal on fact or law from the adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach…'* (Discain Project Services v. Opecprime Developments Ltd [2000] Adj. L.R. 08/09). Although in this instance Bowsher J declined to enforce the adjudicator's decision for breach in relation to natural justice. The rationale for the judge's decision being that it was disclosed that the adjudicator had had 'private' phone calls with one of the parties and perhaps crucially had failed to reveal that to the other party; or give them the opportunity to comment upon any content of such calls. Bowsher J went further observing that *'the adjudicator is working under pressure of time and circumstances which make it extremely difficult to comply with the rules of natural justice in the manner of a Court or an Arbitrator. Repugnant as it may be to one's approach to judicial decision making, I think the system created…can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded.'* Bowsher J appeared to accept that some breaches in natural justice were likely to occur; it was for him a matter of what was acceptable and/or of insignificant consequence. However, in this instance Bowsher J had reached the view that the undisclosed 'private' phone calls and their content was a

step beyond that which could be accepted by the Court. Forbes (2002) suggested that Bowsher felt obliged to observe that Statutory Adjudication would be unworkable unless some breaches of the rules of natural justice, which had no demonstrable consequence are entirely disregarded; otherwise a scenario rendering adjudicators' decisions the subject of continuous challenge based on aspects of natural justice, obscure or otherwise would result.

In 2002, the Court considered natural justice again in Balfour Beatty Construction Ltd v. The Mayor and Burgesses of the London Borough of Lambeth [2002] EWHC 597 (TCC). Lloyd J found that the adjudicator had to conduct the proceedings in accord with the rules of natural justice or as fairly as the limitations imposed by Parliament permit (Coulson, 2007:158). In this case, the judge took the view that non-material breaches of the rules of natural justice could be ignored in Statutory Adjudication (Patterson, 2004). This principle was however refined in a subsequent case, in Costain v. Strathclyde Builders [2003] ScotCS 352 whereby it was held that it would only be proper to ignore such breaches if there were positive signs that they were not material. If there was any doubt about the matter, it would be presumed that the breach was material (Patterson, 2004).

In 2003, the courts were asked to considered natural justice as they had before. In RSL (South West) Ltd v. Stanwell Ltd [2003] EWHC 1390 (TCC) an adjudicator employed a construction programmer to assist him; he had obtained the parties' consent to do so, on the basis that the parties could see the instruction to the programmer and comment upon his report. The parties did not get the opportunity to comment upon the programmer's final report and therefore Stansell Ltd, who had in affect lost, resisted enforcement of the decision. The judge found that there had been a breach of the rules of natural justice and therefore declined to enforce the adjudicator's decision.

Again in 2003 the matter of natural justice was further revisited by the courts and Wilcox J made the following contribution in Try Construction Limited v. Eton Town House Group Limited [2003] CILL 1982:

'(The rules of natural justice) *are not to be regarded as diluted for the purposes of the adjudication process. In the individual case, however, they must be judged in the light of such material matters as time restraints, the provisional nature of the decision, and any concessions or agreements made*

by the parties as to the nature of a process in the particular case.' Here the learned judge was on the one hand saying that natural justice was not to be diluted, but at the same time he recognised time would most likely be a factor in assessing compliance with the rules of natural justice as might, perhaps more surprisingly, the provisional nature of the dispute. This should be considered in light of later work by Kirkham (2004), which suggested acceptance of adjudicators' decisions as final by the parties.

In 2004 the Court refused to enforce an adjudicator's decision on the basis of breach of natural justice in London and Amsterdam Properties Ltd v. Waterman Partnership Ltd [2004] BLR 179. The judge decided that *'The adjudicator ought either to have excluded the late evidence in reply or to have given Waterman a reasonable opportunity of dealing with it. Instead he avoided a decision as to whether or not the evidence should be admitted and then based his decision on the late evidence without giving Waterman an opportunity to deal with it. That was a substantial and relevant breach of natural justice.'*

Thereafter, in AMEC Capital Projects Limited v Whitefriars City Estates Limited [2005] BLR 1 Dyson J, added to the current level of understanding in relation to natural justice when he stated that:

> *'The common law rules of natural justice or procedural fairness are two-fold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be biased. In either event, the decision will be in breach of natural justice…'*

In the subsequent case of Ardmore Construction Ltd v. Taylor Woodrow Construction Ltd [2006] CSOH 3, Lord Clarke further added to the available knowledge by stating:

> *'It is now settled law that adjudicators have to observe principles of natural justice in reaching their decisions. Nevertheless, as the case law has developed, the courts have taken a realistic and pragmatic approach to such questions by emphasising that the nature of the process, and in particular the strict time limits within which adjudicators are constrained to operate, require that insubstantial or technical, breaches of natural justice*

should not be taken merely to delay or avoid payment and the taking of such points should certainly not be encouraged by the courts.'

However 2008 also reminded the industry that not all adjudicators' decisions would be enforced when enforcement was declined in CJP Builders v. William Verry [2008] EWHC 2025 (TCC) on the basis of a breach of the rules of natural justice. Sinclair (2008) commented that although adjudication may be known as rough justice, this case serves as a useful reminder that if the basic principles of natural justice are materially breached, the adjudicator's decision will not be enforced. Sinclair offered the following explanation *'Mr Justice Akenhead held that, as a matter of contractual construction of the adjudication procedure, since the adjudicator was given the power to "set his own procedure" and had "absolute discretion" in ascertaining the facts and the law, he therefore had the power to grant an appropriate extension of time. By not doing so, he was wrong to disallow the late Response and failed to apply the rule of natural justice that each party has a right to be heard and to have its evidence and arguments considered by the tribunal.'*

Also in 2008, case law again sought to further demonstrate as to when the courts would support Statutory Adjudication. Building upon the case of Carillion Construction Ltd v. Devonport Royal Dockyard Ltd [2005] EWCA (Civ) 1358 Akenhead J, in Cantillion Ltd v. Urvasco Ltd [2008] EWHC 282, in considering the grounds that existed for resisting enforcement of an adjudicator's decision he summarised these as, the adjudicator did not have jurisdiction or exceeded that jurisdiction and/or that in reaching his/her decision he/she failed to apply the rules of natural justice or was biased. Usefully Akenhead J took the opportunity to set out the propositions that should be followed when a breach of natural justice is alleged:

'(a) *It must first be established that the adjudicator failed to apply the rules of natural justice;*

(b) *Any breach of the rules must be more than peripheral. It must be a material one;*

(c) *Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;*

(d) *Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this;*

(e) *It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving parties the opportunity to comment, or where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction v. The London Borough of Lambeth* [2002] EWHC 597 (TCC) *was concerned with comes into play.'*

The opinion expressed by Akenhead J in this judgment is still considered to be accurate and leading by commentators (Rawley *et al*, 2013).

However, the Court did refused to enforce the adjudicator's decision in Herbosh – Kiere Marine Contractors Ltd v. Dover Harbour Board [2012] EWHC 84 (TCC). In this case, the adjudicator used a method of assessing the financial compensation that had not been argued by either party; the adjudicator also, having made the calculations, failed to give the parties the opportunity to comment upon them before issuing his decision. The Court considered that to be a breach of natural justice.

2013 also saw a further attempt by a party to resist enforcement of an adjudicator's decision on the basis that he had breached the rules of natural justice and that in any event payment should be stayed on the basis that the party seeking enforcement might be financially unsound. The case was Farrelly (M&E) Building Services Ltd v. Byrne Brothers (formwork) Ltd [2013] EWHC 1168 (TCC), where on the facts the judge found that there had been no breach of the rules of natural justice and further that payment would not be stayed; summary judgment was accordingly granted to enforce the adjudicator's decision.

The current level of understanding, driven predominantly by direction from the courts, is that Statutory Adjudication is subject to the rules of natural justice, but only insofar as the process allows and insofar as any breach must be material if an adjudicator's decision is to be rendered unenforceable.

3.1.13 Natural Justice - The Need to Consider the Defence

Natural justice provides that a party should have the opportunity to have their case heard. This however does not always sit entirely comfortably with a dispute resolution process that has a short time frame, such as Statutory Adjudication.

In Quietfield Ltd v. Vascroft Contractors Ltd [2006] EWHC 174 (TCC) enforcement of an adjudicator's decision was declined; the judge commented that

> *'...the adjudicator ought to have considered Vascroft's substantive defence, but he failed to do so. In those circumstances, as Quietfield have fairly conceded, the adjudicator's decision cannot be enforced because he failed to abide by the rules of natural justice.'*

It appeared clear that the adjudicator must consider the defence(s) rendered and it would seem, give the other party the opportunity to comment upon it.

The same policy in regard to consideration of a defence was adopted in Paul Boardwell t/a Boardwell Construction v. K3D Property Partnership Ltd [2006] (Unreported) whereby the judge also declined to enforce the adjudicator's decision.

Gilliland J also refused to enforce an adjudicator's decision in the case of Humes Building Contractors Ltd v. Charlotte Homes (Surrey) Ltd [2007] Adj. L.R 01/04 on the basis of a breach of natural justice as the adjudicator failed to consider the defence offered.

In a similar vein in Quartzelec v. Honeywell Control Systems Limited [2008] EWHC 3315 (TCC) Honeywell raised an argument in their defence to the adjudication brought by Quartzelec; this argument had not been raised before. The adjudicator decided not to consider this argument and decided in favour of Quartzelec. The Court declined enforcement on the basis that a party may put forward any arguable defence and it is for the adjudicator to consider the defence(s) put forward.

The current level of knowledge directs that in Statutory Adjudication a party can bring any defence that it might want to offer and an adjudicator is ordinarily required to consider it. This can present a challenge to adjudicators in the time made available.

3.1.14 Natural Justice - Claims of Bias - Apparent or Actual

Following on from the 'Discain' case noted earlier in this chapter, the matter of natural justice was revisited by the courts again in 2001; it was clear from then that bias (apparent or actual) would not be tolerated by the courts. In Glencot Development & Design Co. Limited v. Ben Barrett & Son (Contractors) Limited [2001] BLR 207 the judge concluded that an adjudicator must act impartially and the test was simply whether *'The circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal (the adjudicator) was biased.'* It was evident that bias need not necessarily be actual bias; apparent bias based on the fair minded person would render an adjudicator in breach of the rules of natural justice. This judgment provided further guidance as to the applicability of natural justice to Statutory Adjudication as it stated that *'It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit…'.* Lloyd J refused to enforce the adjudicator's decision as during the course of the adjudication the adjudicator had been asked to mediate the dispute. The adjudicator had attempted mediation, but this had failed to reach a settlement. This was sufficient for the Court to conclude that the adjudicator might be seen as potentially bias in consequence of anything that might have been revealed to him in the mediation process. It is observable that adjudicators should not accept mediator appointments in the same dispute, if they plan to continue as adjudicator should mediation fail.

Coulson (2007:117) suggests that the aforementioned judgment had its foundations in the pre-Statutory Adjudication case of R v. Gough [1993] AC 646 whereby Lord Goff said:

> *'Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure the Court is thinking in terms of possibility rather than probability of bias. Accordingly having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favor, or disfavor, the case of a party to the issue under consideration by him…'*

In 2002 the Court returned to the matter of apparent bias in Pring & St. Hill Limited v. C J Hafner t/a Southern Erectors [2002] EWHC 1775 (TCC). Lloyd J considered that there was a real danger of bias due to the adjudicator deciding a dispute further up the line in the contractual chain and therefore he was likely to suffer from bias regardless of intent; accordingly, Lloyd J refused to enforce the adjudicator's decision.

The Court returned again to the matter of bias in AMEC Capital Projects Limited v. Whitefriars City Estates Limited [2004] EWCA Civ 1418, this was an interesting case; the adjudicator had decided the dispute before although his decision was rendered unenforceable, as he was not the adjudicator identified in the Contract. The adjudicator named in the Contract then passed away and the RIBA then appointed the same adjudicator who had decided before. At enforcement the losing party resisted enforcement on the basis that the adjudicator was biased as he had decided before and carried forward the same decision regardless of further submissions by the parties. Dyson J disagreed he stated the position as follows: *'The question that falls to be decided in all such cases is whether the fair-minded and informed observer would consider that the tribunal could be relied on to approach the issue on the second occasion with an open mind, or whether he or she would conclude that there was a real (as opposed to a fanciful) possibility that the tribunal would approach its task with a closed mind, pre-disposed to reaching the same decision as before, regardless of the evidence and arguments that might be adduced.'* Dyson J concluded *'In my judgment, the mere fact that the tribunal has previously decided the issue before is not of itself sufficient to justify a conclusion of apparent bias…it would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same decision as before, particularity if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind…He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct.'* Dyson J concluded that the adjudicator had considered the matter again and therefore was not biased.

The matter of apparent bias was also represented before the Court in 2008 in Makers UK Limited v. The Major and Burgesses of the London Borough of Camden [2008] EWHC 1836 (TCC) however, again the Court was clear in its support for Statutory Adjudication; Akenhead J held that there was no apparent bias in this case and stated: '*One must judge apparent bias objectively, by the standards of the "fair minded and informed observer" referred to in Porter v. Magill. The fact that individuals within Camden are subjectively concerned or distressed by what has happened is not in itself material. Parties to adjudications must avoid making mountains out of molehills even where something happens which is outside their immediate experience.'* The judgment seems to suggest that the Court was losing patience with unfounded apparent bias claims.

In 2009 resistance to enforcement of an adjudicator's decision was also attempted on the basis that the adjudicator must have been biased to decide as he did and this was readily dismissed by the Court (Camillin Denny Architects Limited v. Adelaide Jones & Company Limited [2009] EWHC 2110 (TCC).

The courts also lent support to Statutory Adjudication in relation to allegations of apparent bias in Fileturn Ltd v. Royal Garden Hotel Ltd [2010] EWHC 1736 (TCC). In this case, Royal Garden Hotel Ltd tried to resist enforcement of an adjudicator's decision against them on the basis that the adjudicator was apparently bias as he was once a director of the claims consultancy that represented Fileturn Ltd in the adjudication. The judge enforced the decision concluding that it was unlikely for the fair-minded and informed observer to conclude that there was any case of apparent bias, given that the adjudicator had not been at the firm for some six years.

Later in 2010, the Court returned to the matter of bias and again supported the Statutory Adjudication process. The case was Volker Stevin Limited v. Holystone Contracts Limited [2010] EWHC 2344 (TCC). Holystone Contracts Limited claimed, amongst other things, that during the adjudication and prior to the issuing of the adjudicator's decision Volker Stevin Limited made the adjudicator aware that a without prejudice offer to settle had been made and therefore the adjudicator could be impacted by bias against Holystone. Coulson J considered that the adjudicator was not biased, as a fair minded

and informed observer would not conclude there was a real possibility, or a real danger, that the adjudicator was biased. The adjudicator had noted, prior to becoming aware of the without prejudice meeting, that many elements of the decision had been decided. Coulson J also observed that in a construction contract dispute it was not unusual for negotiations and offers to be made; that need not in any event affect the Tribunal.

In 2015 in the case of Paice and Anor v. MJ Harding (trading as MJ Harding Contractors) [2015] EWHC 661 (TCC) the Court did decline to enforce an adjudicator's decision on the basis that a fair minded observer would consider that there was a real risk of bias on the basis of the facts and conduct of the adjudicator.

Consequent of these developments in Statutory Adjudication, the current level of understanding directs that on the issue of bias the courts are prepared to enforce the adjudicator's decision, unless the responding party can demonstrate actual bias based on the facts of the case or prove the test of apparent bias, i.e. whether a fair-minded and informed observer, having considered all the circumstances, which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he/she was biased. Such instances are not common in Statutory Adjudication and as before, the courts are keen to support Statutory Adjudication where possible.

Bingham (2011) takes the matter of bias further and considers that unconscious bias likely exists in adjudicators. He cites examples that include that an adjudicator might already accept that main contractors treat subcontractors unfairly and are likely to devalue their work based on previous experience. As yet, enforcement of a decision has not been attempted based on unconscious bias. It will be interesting to see how that is viewed by the Court should such a case be presented in the future.

3.1.15 The Local Democracy, Economic Development and Construction Act 2009

In the relatively recent past, there has been a change in the legislation governing Statutory Adjudication; Part 8 of this new legislation deals with construction contracts and amends the Housing Grants, Construction and Regeneration Act 1996. The new Act, entitled The Local Democracy, Economic Development and Construction Act 2009 came into effect in

England and Wales on 1st October, 2011 after amendments to the Scheme for Construction Contracts 1998 to facilitate amendments provided within the new Act.

The main amendments included within the new Act are:

- The requirement for a contract 'in writing' as a precondition for Statutory Adjudication (Section 107 of the Housing Grants, Construction and Regeneration Act 1996) has been removed (Section 139). This opens up contracts that are (i) partly in writing or (ii) wholly oral to Statutory Adjudication (Bailey, 2011). However, the adjudication provisions must still be in writing if they are to have contractual effect, failing which the adjudication provisions of the Scheme for Construction Contracts 1998 (as amended) will apply (Bailey, 2011).
- The contract is to include a slip rule provision in permitting the adjudicator to correct clerical or typographical errors in his/her decision (Section 140).
- As to adjudication costs:

a) Parties can agree a term which would confer power on the adjudicator to allocate his/her fees and expenses as between the parties, providing it is in writing and contained within the construction contract.

b) Otherwise parties can only agree terms which concern the allocation of costs relating to the adjudication between the parties if the agreement is in writing and is agreed after the giving of notice of intention to refer to adjudication (Section 141) (Packman, 2010).

In addition there are changes to the payment provisions contained within the Housing Grants, Construction and Regeneration Act 1996, but these are not relevant for the purposes of this research.

It can be considered that this change in legislation has sought to support Statutory Adjudication. Some of the cases that have generally detracted from the effectiveness have been dealt with, for example the impact of the judgment of Bridgeway Construction Ltd v. Tolent Construction Ltd [2000] CILL 1662, which allowed for pre-agreement of costs of the adjudication has been reduced if not eliminated.

In addition the difficulties created by the 'in writing' requirements of RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) [2002] EWCA Civ 270 have been removed. However, this would appear to place a heavy evidential burden upon adjudicators who are required to decide in a limited time scale. The arguments that might arise from oral or partially oral contracts could create a significant difficulty for adjudicators and a foreseeable further risk of injustice. Jackson (2010) suggests that the practical consequences could be significant, considering that Statutory Adjudication works because it is a fast and simple process and that there is often no need for a hearing and decisions can be made on the basis of documents alone. Jackson suggests that this must change if there is an argument about oral terms or agreements, as deciding what the oral terms are will be necessary before any decision on a dispute. As this will depend solely on witness evidence, it will be necessary to hold a hearing and test that evidence. Parties are likely to insist on the right to cross examine witnesses and may well argue that not allowing such cross examination is unfair and in breach of natural justice. Jackson considers that difficulties could arise as all of the processes of considering and verifying oral terms or agreements will need to be accommodated in tight time scales (potentially 28 days) and this would create significant difficulty in that a preliminary hearing and cross examination followed by a determination as to whether there is a contract or what the terms are, may not be possible.

Further it would seem that mistakes such as the mathematical ones made in Bouygues (UK) Ltd v. Dahl Jensen UK Ltd [2000] BLR 522 could potentially be corrected under the new slip rule, which would follow the case of Bloor Construction (UK) Ltd v. Bowmer and Kirkland (London) Ltd [2000] BLR 764 in which the judge stated *'In the absence of a specific agreement by the parties to the contrary, there is to be implied into the agreement for the adjudication power for the adjudicator to correct an error arising from an accidental error or omission or to clarify or remove ant ambiguity in the decision which is reached, provided this is done in a reasonable time and without prejudicing the other party'.* It is difficult to see how correcting the sum due would not prejudice a negatively affected party (at least in the short term) and it would seem that the new legislation is seeking to rebalance that suggestion. It would further seem that these changes

were influenced significantly by public policy and seek to address situations that might generally be considered unjust.

All of this previous case law, legislation (as amended) and knowledge was very informative and has contributed significantly to what is actually known about Statutory Adjudication.

3.1.16 An Adjudicator's Perspective

Entwistle (2012) considered the potential impact of the new Statutory Adjudication legislation (The Local Democracy, Economic Development and Construction Act 2009) from an experienced adjudicator's perspective. Entwistle (2012) further notes that over the years there have been many comments about the ability of and quality of adjudicators. He further suggests that such comments should not be dismissed as the disgruntled reactions of disappointed parties or representatives and they should not be ignored. However, Entwistle (2012) also considers that adjudicators and Adjudicator Nominating Bodies must take the task and responsibilities attached thereto very seriously. He concedes that all may not go as well as it could in adjudication and suggests that this could be influenced by the fact that time is limited and that the parties' submissions may not be presented in the best way.

Entwistle (2012) also considers that the Local Democracy, Economic Development and Construction Act 2009, appears to do little to make the adjudicator's job any easier, or to facilitate improvements in performance.

As Entwistle (2012) reviews some of the changes he considers the likely impact upon adjudicators. He suggests that the repealing of Section 107 of the Housing Grants, Construction and Regeneration Act 1996 will be positive insomuch that there will no longer be a number of jurisdictional challenges based upon the lack of a contract in writing. That common path of challenge will be dispensed with by allowing adjudication of oral or part oral contracts.

Entwistle (2012) observes that the attempts to address the difficulties of inter party costs and the adjudicator's fees and expenses by seeking to outlaw 'Tolent' style clauses has been the subject of fierce debate and appears in his view to have failed and complicated matters further.

Interestingly Entwistle (2012) notes, from an adjudicator's perspective, his disappointment that the opportunity '*to level the playing field as between the referring party and the respondent*' has been missed from the new legislation (The Local Democracy, Economic Development and Construction Act 2009). In this regard, Entwistle is referring to the ability of the referring party to unilaterally extend time for the reaching of the decision, whilst no such equal right applies to the respondent, and he suggests that the scenario is a regrettable inequality of treatment of the parties and further that it denies the adjudicator a potentially useful management tool.

Entwistle suggests that the parties and their representatives could do much to improve and that in turn would provide for more accurate decisions by adjudicators. He considers that the decisions reached are based on the material submitted and the quality of the material submitted and its timing can have a major impact. He also criticises multiple submissions and suggests that there really should be no need for more than a Referral, Response and Reply, allowing each party to receive what the rules of natural justice attempt to provide them with; the opportunity to present their case and to answer that of the other party.

Entwistle considers that the less time and effort expended in the preparation and submission of a party's case, the more time an adjudicator will need to understand it. Ultimately, one or both of the parties will pay the cost of that time. Entwistle suggests that it must rankle with adjudicators that complaints are made about the cost of the process when, in many instances, the cost has been driven up by inadequacies in the parties' submissions. He further suggests that the parties should not seek remedies without explaining the legal or contractual basis of their claim; he considers that a good example of this is interest and he contends that more frequently than not, no attempt is made to set out the entitlement of interest. He further suggests that the parties seldom set out their arguments regarding the basis on which the adjudicator should determine who should pay the costs of the adjudicator.

Of more importance to Entwistle is that the parties, particularly the referring party, do not clearly set out the issues that the adjudicator needs to address. Entwistle suggests that this is very seldom seen and that most adjudicators

conduct this exercise themselves. If the parties were to do this it would render the decision less expensive and potentially more focused.

Entwistle further identifies that the parties are often relentless in the furnishing of irrelevant information and that it is highly probable that the adjudicator will read everything sent to him/her. He considers that it is not for the adjudicator to draw peremptory conclusions about what is relevant and what is not. Entwistle suggests that the absolute rule applied by the parties should be: If a document is not important enough to be referred to in the narrative of a submission, it is not important enough and should not be included.

Entwistle summarises his view of the new adjudication legislation by reference to the adjudicator's perspective and concludes that the new legislation will do little to assist adjudicators in their task. It is interesting to see that from a practising perspective Entwistle considers that the parties and their representatives could do much to improve and that would necessarily improve the task of the adjudicator and potentially increase the quality and cost effectiveness of the decisions reached.

3.1.17 Decision-Making by Adjudicators

In developing an understanding of Statutory Adjudication it is important to consider what is known about how an adjudicator might decide a dispute, as such decisions can be of significant consequence.

Eaton (1998) concluded within his early work that the adjudicator's decision will be *'based on a strict analysis of the contract documents, variations and instructions, not on guts and sympathy*.' In essence this is what Riches and Dancaster (2004) and Coulson (2007) consider to be the correct approach; application of the law to the facts.

This early work of Eaton was of value, albeit a relatively simple guide. Eaton had noted that the adjudicator would analyse the contract and associated documents in reaching his/her decision and apply them strictly.

Riches and Dancaster (1999) went further to consider the outline of how an adjudicator might decide a dispute. This work was informed and based upon their practical experience. They identified that the adjudicator determines the facts. Where facts conflict he/she determines which are correct. Once those

facts are known, the adjudicator applies the common law (as applicable) and the contract to the facts which he/she has established; this is how they consider that the adjudicator's decision is reached (Riches and Dancaster, 1999:214). There was however, no mention of influencing factors that might impact upon an adjudicator and/or how the adjudication might deal with such factors in their published work.

Edwards and Anderson (2002) concurred with the previous views of Eaton (1998) and Riches and Dancaster (1999). They identified that *'An Adjudicator must use the facts, the applicable law and the relevant terms of the pertaining contract and adjudication procedures to reach his decision.'* and continued to identify that an adjudicator's role is to apply the terms of contract in the same way as an architect, engineer or surveyor, the difference being that the adjudicator's decisions are more immediately enforceable (Edwards, 2002:183). This work in reality built upon and enhanced the views expressed by Eaton (1998) and Riches and Dancaster (1999) but added the identification of the speed of enforcement potentially available in respect of an adjudicator's decision. However, they also go on to suggest that *'...It is considered that in practice an Adjudicator will arrive at a decision based upon 'balance of probabilities'*. This is of course no different to how a judge would be expected to decide in a civil case. It also seems that such a decision could be subject to influencing factors as has been suggested in previous research into judging in civil cases (Gillman, 2001).

Interestingly, Edwards and Anderson go on to state that *'It has been suggested that, in practice, an Adjudicator will often assess the merits of a dispute as he/she sees them from a personal perspective as, say, a professional consultant or site contractor and then take cognisance of the facts and the applicable law that supports that view in order to reach its decision. Whilst realising that it is easier said than done, an Adjudicator must recognise this as a potential problem and try to ensure, as far as possible, that there is no related partiality in its thought processes that might affect its decision.'* (Edwards, 2002:184).

This is interesting, as it seems that the authors had considered that the personal perspective of an adjudicator might influence his/her decision. Whilst the text is limited and does not expand significantly beyond this suggestion, it

is such that some thought had been given to the personnel perspective of an adjudicator and that it seemed that this could be an influence that would need to be excluded, in order to resist the possibility of bias, as far as that might be possible, by the individual adjudicator. With this in mind, it would appear that regulation to ensure that this happened would be very difficult, if not impossible, to enforce. However, it can be seen by reference to case law; In Carillion Construction Ltd v. Devonport Royal Dockyard Ltd [2005] EWCA (Civ) the judiciary sought to deal with the personal perspective by reference to fairness and perceived bias. It is observable that the courts can regulate, to some degree, by the judgments derived from case law.

In 2003, Simmonds published his work, which was similar to Edwards and Anderson in context; he chose to produce a practical guide, although this particular work does not add substantially to this research. As a learned arbitrator and adjudicator, it did provide parties with a valuable source of reference. Simmonds does however make a valuable point that is related to decision-making by the adjudicator, particularly in complex matters, whereby he stated that *'The limited time scale, even if extended, can prevent an adjudicator giving proper attention to a multitude of separate issues with the result that he will probably be unable to do justice to the task presented to him.'* (Simmonds, 2003:16). This is a clear indication from an experienced practitioner that the time allowed by the statutory process could potentially have an influence upon an adjudicator's decision. Simmonds suggests that the right to refer a dispute at any time can contribute to the timescale difficulties.

After Simmonds (2003) it was clear that some further thought had been given to how an adjudicator might decide a dispute; Riches and Dancaster (2004), identified the decision-making process in adjudication was a separate and simple process. That process, they consider, is as follows:

- *Sort out the facts that have a bearing upon the decision we have to make;*
- *Consider the influences that will also have a bearing;*
- *Look at the alternatives; and*
- *Chose the appropriate one (alternative) in light of all the circumstances applying at that particular time.*

The authors continue to consider that *'Decision making as an adjudicator in respect of a dispute, however complex it may be, is little different…'* from the above.

They explain further by stating that *'The adjudicator has to ascertain the facts. Where facts are disputed he has to decide which version is correct. Once those facts are ascertained, the adjudicator has to find out whether any constraints apply to the parties that may have a bearing upon the facts. For example, those facts may show either that the terms of the contract have been complied with or they may show the reverse. The common law, that is statute and case law, may also have a bearing upon the issues. The adjudicator makes his decision by applying his findings in respect of compliance with the contract and/or common law to the facts he has ascertained.'*

Whilst this is an attempt to explain the decision-making process that an adjudicator should adopt it is however limited in its application to this research, insofar as it fails to consider all of the complex factors that might influence an adjudicator in arriving at his/her decision.

In 2007 HHJ Peter Coulson QC, a well-regarded judge with much experience of the Technology and Construction Court had published a highly respected text upon the subject of Statutory Adjudication. The book was generally considered, at that time, to be the leading book on the subject and as such a significant contribution to the then available body of knowledge.

The work of Coulson is comprehensive and seeks to demonstrate the position of adjudication prior to December, 2007. The case law reviews are detailed, as one might expect from a judge. There is also quite detailed consideration of the process of adjudication. It is informed work that provides for the basis of a comprehensive understanding of adjudication prior to the time of publishing.

The work is however silent as to factors that might influence an adjudicator in his/her decision-making process and does not consider the decision-making process itself in any great detail. The work is now already somewhat outdated and has now benefitted from two updates to reflect a more current level of knowledge and consideration of subsequent judgments. The Second Edition was published in 2011 and the Third Edition was published in 2015. Whilst this work added to the available body of knowledge in regard to adjudication

generally, it continued not to consider factors that might influence adjudicators in their decision-making,

Kirkham sought to add further to the level of knowledge in relation to decision-making by adjudicators by commenting in 2007 that in deciding a dispute an adjudicator needs to (1) clearly identify the issues of law and the facts (2) render clear decisions on each issue (3) identify reasons to justify each and every decision. Kirkham concludes by stating *'Lord Denning said that giving reasons for judgments is the whole difference between a judicial decision and an arbitrary one.'* It is however interesting that Kirkham takes the view that adjudicators render clear decisions and then identify reasons to justify each and every decision. One might expect that reasons would be identified first.

3.1.19 Summary: The Evolution and Development of Statutory Adjudication

The introduction of Statutory Adjudication in May 1998 was an unknown entity to many working in construction dispute resolution, as to how such a method of resolving disputes would work on an interim basis and still maintain a binding effect. However, even though Parliament declined to give Statutory Adjudication any formal definition, it has managed to evolve and develop gradually through the courts and gain respect as the leading method of resolving domestic construction disputes.

Statutory Adjudication was intended to be cost effective and provide a temporary basis upon which parties to a construction contract could resolve their disputes whilst the project was on-going, allowing parties to re-visit the dispute after Practical Completion when on reflection they could accept the decision and make it final or seek to hear the dispute in the formal setting of litigation or arbitration, or come to a settlement. Whilst these options have always been available to the parties, it would seem that Parliament through the Housing Grants, Construction and Regeneration Act 1996 (as amended) has allowed Statutory Adjudication to go much further, and in fact has led to many parties waiting until after Practical Completion to address their dispute in Statutory Adjudication, and often regardless of when the dispute is referred, accepting the decision of the adjudicator as final.

Statutory Adjudication has been described by some commentators as being ‘so successful’ (Uff 2012:6), that is likely linked to Statutory Adjudication being a more proportional method in terms of time and cost to resolve a dispute, even if the answer is in some way quick and possibly rough justice.

The fact that a party may refer a dispute to Statutory Adjudication ‘at any time’ was a concern in the early days following the introduction of Statutory Adjudication, but this was perhaps due to the fact that party representatives were used to a longer procedural process in line with or akin to the Civil Procedure Rules which govern litigation. This rough and ready method of resolving disputes without first giving the other party the notice of the potential dispute and the opportunity of resolving the disputed issues by negotiated settlement or some other means before going to litigation or arbitration, and the process of full disclosure, etc. was seen as making the situation suitable for one party to ambush the other, by simply serving a Notice of Adjudication. The courts were quick to extinguish these types of arguments, making it clear that any type of alleged ambush did not amount to procedural unfairness. It was made very clear by the courts that ‘at any time’ meant exactly that (subject to any applicable limitations), whether the parties had commenced other proceedings or not, it does not matter.

The Local Democracy, Economic Development and Construction Act 2009, no longer requires contracts to be in writing, accepting that a contract may be in writing, partly written and partly oral, or totally oral. It is now the case that in all qualifying construction contracts regardless of written or oral agreement shall have the benefit of Statutory Adjudication.

Statutory Adjudication has seen a reasonable amount of case law evolve with regard to there being one or more disputes. Much of the case law involved difficult cases where a dispute comprised of a number of issues rather than simply one issue. Therefore, where claims have a connection, such as an interim valuation which includes a loss and expense claim, the courts will allow a decision which includes an extension of time even though this did not form part of the dispute put forward. The reason is that without the decision of one, the decision of the other cannot be established, both being closely connected. Unless the issues are entirely unconnected, the courts have no difficulty in enforcing an adjudicator’s decision.

As with ambush, above, the courts have grappled with the issue of complex disputes. However, after some unclear decisions in the early days of Statutory Adjudication, there was certainly a change in direction and the courts were clear that so long as the adjudicator was satisfied that he/she was able to reach a fair decision within the time allowed, there is no issue as to whether the dispute is too complex or not.

The courts by virtue of their willingness to enforce adjudicators' decisions are what make the Statutory Adjudication process credible. From the very early days of Statutory Adjudication, the courts have made clear that an adjudicator's decision is binding until such time as the dispute is finally resolved. There is also the fact that even though adjudications are temporary binding, many parties accept decisions from Statutory Adjudication as the final determination of the dispute, even where there have been serial adjudications; parties tend to accept the decision on each issue as final. This compilation of finality and the possibility that the courts will enforce a decision so long as the adjudicator answers the right question, even if he/she answers it incorrectly, would suggest that parties are either generally satisfied with the decisions of adjudicators or accept that further pursuit is not viable.

The courts, in maintaining a supporting role of Statutory Adjudication, have been prepared to take practical steps where the Housing Grants, Construction and Regeneration Act 1996 (as amended) were silent. Such steps have included implying a slip rule to allow adjudicators to correct typographical errors, and permitting the severing of a decision where it is possible to do so. It would appear that such steps were taken in order to maintain an enforceable decision in support of Statutory Adjudication. These issues, as with many others, have come from the requirement for a party to have to enforce the adjudicator's decision in the Technology and Construction Court and generally, the Court has been supportive of Statutory Adjudication whilst also providing clarity.

A large percentage of enforcements are defended on the basis that there had been a breach of the rules of natural justice. It has been recognised that even though Statutory Adjudication is a rough and ready, temporarily binding method of resolving disputes, the adjudicator must still abide by the rules of natural justice insofar as the statutory process allows. Any breach of the rules

of natural justice must be more than peripheral; it must be a material breach. The importance of ensuring that a responding party has its say, especially when formulating its defence, has developed and been supported by the courts as being a material factor in deciding if there was a breach of the rules of natural justice. Bias is a particularly important factor for an adjudicator to consider when dealing with the parties, or arriving at his/her decision. Much of the bias (actual or apparent) argument was dealt with in the relative early days of enforcement of adjudicators' decisions, and has generally been less likely to succeed as time has gone by, with adjudicators having the developed knowledge of what the courts consider as bias.

It is interesting insofar as case law has identified personal perspectives and sought to deal with apparent or actual bias. Natural justice features, but there would seem to be a personal perspective incorporated within acting fairly and it further seems that the courts take account of the unique and restrictive process of Statutory Adjudication before applying the entire principles of natural justice to this form of dispute resolution. In consequence, resistance of enforcement of an adjudicator's decision is unlikely to succeed unless the breach of natural justice is substantial.

Bingham (2011) adds to the bias debate and suggest that adjudicators will suffer from unconscious bias. This one might suggest will contribute to decisions of adjudicators' being unpredictable.

Entwistle (2012) also adopts an interesting position when he suggests that the parties could do much more to assist the adjudicator in order to reduce costs, improve focus and potentially improve the quality of decisions.

The legislation and case law, most properly described as the 'common law' has provided a detailed base to establish and enhance the current understanding of Statutory Adjudication. The courts have in general been very keen to support the will of Parliament and enforced adjudicator's decisions.

Knowledge in relation to decision-making by adjudicators is less comprehensive; experienced practitioners have expressed their views and progressed to identify how an adjudicator decides. It would appear that the process of decision-making is basically known and might be considered relatively simple at first glance. However, this needs to be contrast with the view that adjudicators' decisions are unpredictable which would seem to

suggest that one cannot apply a simple process of decision-making to a complex situation that may well be subject to many external factors or influences.

Generally, knowledge of Statutory Adjudication is well developed but it will however, by its very nature, continue to develop as it continues to evolve with the courts playing a significant part in current, and one suggests, future developments in this specialist area of dispute resolution. Continued knowledge enhancement should be considered essential. This has become paramount with the mobilisation of new legislation.

The knowledge of decisions and more specifically the decision-making processes and potential influences applicable to Statutory Adjudication is currently relatively simplistic and in need of further development and enhancement.

This section of the Literature Review serves to meet objective 1 (a) to conduct a detailed Literature Review to establish the current level of knowledge in relation to Statutory Adjudication.

3.2 WHAT IS CURRENTLY KNOWN ABOUT PREDICTING DECISIONS IN FORMAL CONSTRUCTION DISPUTE RESOLUTION AND PARTICULARLY STATUTORY ADJUDICATION?

3.2.1 Predictability of Statutory Adjudication

Commentators, some of which are included below, suggest that Statutory Adjudication is unpredictable. However, previous generic research suggests that at least one factor, being the Claimant, has an impact on predictability. That is to say, one is more likely to be successful in an adjudication if one is the Claimant (Kennedy and Milligan, 2010).

The lawyers Goodman Derrick advise that it is difficult to predict the outcome of any adjudication.

Critchlow (2003) concluded that there is some evidence that the courts are proceeding on a case-by-case basis, having regard to unpredictable public policy, rather than by reference to first principles. This, together with inconsistency in decisions, made it increasingly difficult for advisers to carry out accurate commercial risk assessments in conjunction with their clients. Critchlow (2003) had observed that whilst adjudicators' decisions might be unpredictable so might enforcement of an adjudicator's decision. Critchlow (2003) considers that adjudication is unpredictable.

Franklin prepared a paper on adjudication in December, 2005 in which she stated that '*...in order to predict the future, you have to consider the past'*, which seems to suggest that past experiences will influence future decisions. Rather disappointingly, Franklin does not go further to explain or support this position. Whilst such a suggestion might well have merit, it is important to further note that for example past cases are over turned by courts, thus whilst consideration of the past might well be appropriate, it cannot be considered a guarantee of future interpretation.

In the same year, Randle stated that '*once you are in adjudication, it is important to appreciate that the procedure can be unpredictable.'* (Randle, 2005). Randle seems to allude to the fact that in his experience adjudication is unpredictable as he describes it further as '*An expensive way to flip a coin*'. Whilst such a comparison does not appear to be supported by any

attestable research, it should be acknowledged as an informed view of an experienced practitioner, well versed in the process of Statutory Adjudication.

Critchlow (2007) suggested that the essence of giving legal advice is to predict how judges will decide cases. Thus, the outcome of cases cannot always be wholly anticipated by understanding the principles from the cases; it is also necessary to understand trends in judicial attitudes. Such fluctuations in judicial attitudes are discernible in the realm of adjudication and are an integral part of bias, be that actual, apparent or unconscious.

If one contrasts the research undertaken at the Adjudication Reporting Centre (Kennedy *et al*, 2010) it can be seen that a referring party is the most likely one to be successful. Whilst taken from historical data, it would seem to offer the first link to an integral element of a model that may establish predictability.

The work identified above would appear to suggest that decisions in Statutory Adjudication are unpredictable. However, such views do appear to be based upon what should respectfully be considered relatively limited experience and not concluded from transparent, comprehensive and testable research.

3.2.2 Predictability of Construction Litigation in America

Some research has been conducted in America in relation to construction litigation; early work based on artificial neutral networks considered cases conducted in Illinois where the sample of 114 cases was extracted from cases conducted across a twelve year period. The study acknowledged that a large number of complex and interrelated factors might influence decisions. However, by application of artificial neutral networks it was shown that in this research a predictability rate of 67% was achieved (Arditi *et al*, (1998)). This was considered valuable as if the parties to a dispute knew with some certainty how the case would be resolved it was believed that the number of disputes would reduce greatly. One might however question whether the percentage of predictability achieved would be significantly high enough for parties to consider this method sufficiently accurate.

Arditi returned to predictability of construction litigation in 1999 and by applying a different methodology; that of Case Based Reasoning (CBR) a

higher rate of predictability of 83% was recorded by utilisation of this methodology.

Arditi and Pulket (2005) both based at Illinois Institute of Technology, Chicago, subsequently supplemented this work. In this instance they applied a different system, that of 'Boosted Decision Trees'. They applied this system to the same 114 Illinois litigation cases considered in the 1998 and 1999, work of Arditi, but augmented this by another 18 cases filed in 1999 or 2000; in this study, a prediction rate of 90% was shown to be achievable.

by 2010 Arditi and Pulket had conducted a further study; they applied a different model to the 132 Illinois cases utilised in their early work by application of an Artificial Prediction Model involving four processes, namely, data consolidation, attribute selection, prediction using hybrid classifiers, and assessment. A prediction rate of 91% was obtained. The resulting predictability from this model was superior to that of the earlier work, which sort to apply artificial neutral networks, CBR or boosted decision trees. It would seem that this work had achieved a high degree of predictability when applied to a given sample in construction litigation.

3.2.3 Predictability of Construction Litigation in Hong Kong

The consideration of construction claims taken to litigation in Hong Kong was undertaken by Chau of the Hong Kong Polytechnic University he had work published in 2006. The abstract states :

> '*Since construction claims are normally affected by a large number of complex and interrelated factors, it will be advantageous to the parties to a dispute to know with some certainty how the case would be resolved if it were taken to court. The application of recent artificial intelligence techniques can be cost effective in this problem domain. In this paper, a case-based reasoning (CBR) approach is adopted to predict the outcome of construction claims, on the basis of the characteristics of the cases and the corresponding past court decisions. The approach is demonstrated to be feasible and effective by predicting the outcome of construction claims in Hong Kong in the last 10 years. The results show that the CBR System is able to give a successful prediction rate higher than 80%. With this, the parties would be more prudent in pursuing litigation and hence the number of disputes could be reduced significantly.'* (Chau, 2006).

This is a high degree of predictability and it will be an interesting consideration to see how one might be able to apply some aspects to Statutory Adjudication. Immediately it is apparent that such a model might not work with Statutory Adjudication as being a private process the decisions of

adjudicators are not generally within the public domain and of course, court judgments are.

It is interesting to observe that this research compliments and offers comparable predictability with that conducted by Arditi in 1999. This would appear to suggest that the results are likely to be accurate.

If one contrasts this with litigation in the UK, it can be seen that Gleeson (1998) considers that *'...the practical application of a legal principle depends on a case by case examination of facts and circumstances, so that it may be difficult to predict in advance of litigation what the consequences of the application of the principle might be. The uncertainty does not lie in the identification or formulation of the legal rule; it exists because the rule is such that its practical operation requires an examination of the facts of each individual case. The uncertainty is increased if relatively minor differences in the facts, or different approaches to the exercise of judicial discretion, can produce different outcomes in litigation.'* This might suggest that the anticipation in respect to predicting outcomes in the UK would be more difficult; albeit that such a statement does not appear to be supported by attestable research.

3.2.4 Predictability of Arbitration

The aforementioned research conducted in America and Hong Kong is in quite stark contrast to some American work that was published by the American Society of Civil Engineers in 2009 entitled 'Consistency and Reliability of Construction Arbitration Decisions: An Empirical Study (Ossman *et al*, 2009). The abstract described the research as follows:

> *'While construction arbitration is analysed in a plethora of information, there is paucity of hard data about the consistency and reliability of the construction arbitration decision. The assumption that an industry familiar arbitrator will provide a reliable and consistent decision in comparison with the expectation of the industry as a whole has not been tested. This paper presents the results of a study on the reliability and consistency of construction arbitration through the examination of a variety of arbitrators' decisions on the same construction scenario. Data was collected from attorneys, owners, owner representatives, contractors and subcontractors. Compilation of the survey results finds little consistency in the arbitrator's awards, but with much thoughtful care in award consideration. The results suggest that the arbitrator's industry background does not influence the arbitrator's award. There is also no significant award bias due to the arbitrator's educational level or years spent in construction business. The*

> *results also indicate that previous arbitration experience does not predict the award outcome. The paper concludes that construction arbitration is wholly unpredictable. However, the result will be well reasoned and unbiased decision.'* (Ossman *et al*, 2009).

Industry background was found not to influence the decision of the arbitrators; this would seem to suggest that arbitrators can exclude their previous positive or negative backgrounds from a given dispute. It is also surprising that arbitrators do not appear to decide differently when observing the arbitrator's level of experience. It might be argued that less experienced arbitrators might make mistakes and accordingly decide differently or in conflict with rules governing the arbitration or common law, however this research suggests that that is not the case.

It is worthy of note that as long ago as 1869 in the UK traders complained to a Judicature Commission about arbitration. The complaints made against arbitrators were that their decisions tended to be idiosyncratic and unpredictable, and they decided cases according to their personal notions in what was fair in the circumstances, rather than according to general principles, which could be applied across a broad range of cases (Gleeson, 1998).

This American work on arbitration is quite different to the predictability suggested by the work in America and Hong Kong concerned with construction litigation. The reasoning would require quite detailed consideration. Perhaps the type of model has an influence. Perhaps the forum is particularly important. This research will consider this with regard to Statutory Adjudication, a process that is quite different to Arbitration. Notwithstanding Statutory Adjudication would appear to be in the same position as arbitration prior to the aforementioned work, insofar as no reliable research has been conducted into predictability of decisions in Statutory Adjudication.

This section of the Literature Review serves to meet objective 1 (b) to conduct a detailed Literature Review to establish the current level of knowledge in relation to predicting decisions in formal construction dispute resolution.

3.3 WHAT IS CURRENTLY KNOWN ABOUT FACTORS THAT MIGHT INFLUENCE DECISIONS IN FORMAL CONSTRUCTION DISPUTE RESOLUTION AND PARTICULARLY STATUTORY ADJUDICATION?

Some work, as identified below, has been conducted to identify factors that might influence decisions in formal dispute resolution.

It can be seen from the work conducted in America that in arbitration, as opposed to adjudication, the industry background of the dispute determiner arguably has no influence upon the award.

By contrast, if one considers further American work, Professors Morriss and Heise (1998) considered litigation and whether prior experience affects judicial decision-making, it can be seen that prior experience plays a significant role in judicial decision-making.

Henson (2009) conducted further American work, again focused upon litigation, he suggested that legal scholars had become sceptical of judges' attempts to explain decisions based exclusively on applying fact to law, and have attempted to identify factors that influence judicial decision-making. Particularly, Henson (2009) concludes that some significant factors in judicial decisions may be open to manipulation by litigants. A good example of this is Anchoring, a well-known Psychological bias.

However, work in regard to the consideration of influencing factors that might affect an adjudicator's decision-making process has been very limited, particularly in a comprehensive format.

Notwithstanding, an extensive literature review identified a range of potential factors that influence decisions made in Statutory Adjudication, these factors fall under four main categories:

(a) The Process of Statutory Adjudication;

(b) The Person – the Decision Maker;

(c) The Dispute; and

(d) The Parties or Their Representatives.

Each are considered in turn below:

3.3.1 The Process of Statutory Adjudication

Integral to the Process of Statutory Adjudication there are potential factors that influence decisions made in Statutory Adjudication.

3.3.2 The Notice of Adjudication

The Notice of Adjudication commences the process of adjudication. Simmons (2003) considers that the Notice of Adjudication must be accurate. Coulson (2007) identifies that the Notice of Adjudication is very important as it defines the dispute and the jurisdiction of the adjudicator. Yet there have been a number of cases before the Court concerning defective Notice(s) of Adjudication. Entwistle (2012) complains about lack of quality of parties' documentation and suggests that this must impact upon the adjudicator as the decision maker. It is foreseeable that a defective notice might impact upon the decision of an adjudicator.

3.3.3 Appointment of the Adjudicator

The referring party has the benefit of being able to select an Adjudicator Nominating Body. It is likely that they will select a body that will provide an adjudicator that is best suited or perceived to be most favourable to the referring party's case. The referring party can do this by requesting a particular adjudicator and often the ANB will seek to comply, as it is foreseeable that the ANB is unlikely to seek to argue with a referring party, who is paying the nomination fee to the ANB. It may be that the referring party will seek to limit the likely pool of adjudicators by establishing limited criteria for selection; again, an Adjudicator Nominating Body will often comply. The parties could agree to the appointment of an adjudicator, but otherwise the referring party has much more control or influence over who might be appointed to decide the dispute.

3.3.4 Challenging Jurisdiction of the Adjudicator

Molloy (2011) and Entwistle (2012) consider that jurisdictional challenges are numerous or almost endless. The net result being that the adjudicator finds himself/herself having to decide to continue or resign. It is foreseeable that an adjudicator will, negatively view such objections to jurisdiction, particularly if groundless. Bingham (2006) suggests that the actions (such as objecting to jurisdiction) of the parties or their representatives are likely to have an impact

upon the decision maker. It is foreseeable that such objections could be a factor that impacts upon an adjudicator in arriving at his/her decision with a negative result arising from the party making the jurisdictional challenge.

3.3.5 The Referral Notice

The Referral Notice is the statement of claim of the referring party. Such a document is very important to that party (Coulson, 2011). The referring party will have had a theoretical unlimited time to draft it in advance of serving the Notice of Adjudication and for that reason, it should be accurate and free from errors. Despite this errors and inaccuracies do occur. Molloy (2011) suggests that the parties must do all they can to assist and persuade the adjudicator with their submissions, therefore a carefully drafted Referral Notice is likely to be a factor that will impact upon an adjudicator in his/her decision-making.

3.3.6 Compliance with Directions

An adjudicator issues Directions upon receipt of the Referral Notice. The adjudicator will expect compliance; if a party fails to comply with the Directions it is possible that that will negatively impact upon an adjudicator in his/her decision-making. Bingham (2005) suggests that a poor reputation, based on the inaction or actions of a party or their representatives is likely to adversely affect the decision maker. Failure to comply with Directions is likely to be a factor that might impact an adjudicator in his/her decision-making.

3.3.7 The Response

The responding party's first comprehensive submission will be the Response. This is their opportunity to set out their defence and counterclaim. Coulson (2011) suggest that this is also a very important document. Entwistle (2012) comments that responses can be poorly drafted, noting commercial and time pressures as possible rationale. Molloy (2011) and Entwistle (2012) suggest that the parties could do much to improve their submissions and in particular, the Response is often a lesser quality document. It would appear likely that a poor quality Response might impact an adjudicator in his/her decision-making, not least as he/she might not understand the responding party's case or basis of argument or because such argument is not properly supported, in such

instances it is foreseeable that the adjudicator might be minded to decide against the responding party.

3.3.8 Reply and Rejoinder

There is no automatic right for a party to make a submission to the adjudicator beyond the Response. However, a Reply followed by a Rejoinder or further submissions is also likely whether requested or not. Molloy (2011) questions whether such additional submissions should be or are necessary. However, commentators suggest that the more you submit to an adjudicator the more it may impact his/her impression of your case. Such additional submissions might impact upon an adjudicator in his/her decision-making.

3.3.9 Timescales Associated with the Process

Timescales in Statutory Adjudication can be very tight. If un-amended, the adjudicator is to reach a decision within 28 days. The referring party may extend the duration by up to 14 days requiring a decision within 42 days or the parties may agree the duration of the adjudication. Riches and Dancaster (2004) suggest that reaching a decision in 28 days can be challenging. Kirkham (2004) suggests that due to the time limits, some disputes may not be suitable for resolution by adjudication. Bingham (2006) disagrees and considers that any dispute, properly argued in advance, can be adjudicated in 28 days.

Entwistle (2012) considers that a responding party is likely disadvantaged by not being able to extend time by up to 14 days as a referring party can acting alone.

Commentators such as Simmons (2003) suggest that being the responding party, is a disadvantage as that party is limited in time, only typically 7 – 10 days to provide a Response to the claim against them. Coulson (2005) considers that some referring parties may anticipate a tactical advantage in referring a complex dispute in a short timescale, albeit he also challenges the rationale of such a tactic.

Timescales in an adjudication are likely to be a factor in seeking to predict decisions. Immediate questions arise such as:

1) If the responding party has longer, are they likely to be more successful?

2) If the referring party refuses to extend time, what impact does that have on the adjudicator?

3) Are decisions that take longer more predictable?

Whilst the Literature Review reveals contributions on timing, such work has not considered whether the time available in adjudication impacts upon the predictability of an adjudicator's decision.

3.3.10 The Person – the Decision Maker

In 1998, some research reported by the Royal Institution of Chartered Surveyors stated that *'...the individual adjudicator will without doubt influence the outcome of each adjudication, but it may be said that this influence will have much deeper consequences in the early years of the Act.'* (Yeoman *et al* 1998).

It is conceivable that the selection of a particular adjudicator may influence the outcome of a particular dispute. Such a suggestion needs quite detailed analysis and testing and this currently does not appear to exist.

3.3.11 The Quality of the Adjudicator

There has been some sound and some anecdotal evidence suggesting that the quality of adjudicators is a cause for concern (Henchie, 2004). Bingham (2004) also commented that he was '*not confident that all the candidates ready and willing to adjudicate are up to the job.'* Within the same text he concluded by stating *'...the user wants a better trained and certified decision maker who knows the construction industry.'* However, others have expressed the view that as a user of the process, the quality of the adjudicator is of paramount importance and the quality experienced is positive (Blacker, 2006). Randle however counters the latter by considering that the quality of adjudicators can be variable (Randle, 2005). The Report of the Construction Umbrella Bodies Adjudication Task Group published in July 2004 recorded that there are concerns about the quality of adjudicators. Entwistle (2008) considered that adjudicators vary greatly in their ability to discharge their duties expeditiously or cost effectively. In 2008, The Centre for Effective Dispute Resolution in responding to concerns generally announced an overhaul of their panel of adjudicators in an attempt to improve quality.

Cottam (2005) approached quality differently by stating that *'Adjudication has been an outstanding success in so far as it has largely solved the problem that it was introduced for...'* He did however qualify this by observing that *'The reputation and continuing support for adjudication is largely in the hands of adjudicators. Their task has changed and with it the skills needed to perform well. There has been a growing swell of criticism from disgruntled parties or their advisors, again largely apocryphal because of the reluctance of parties' representatives to make formal complaints for fear of having the same adjudicator appointed on subsequent referrals.'* (Cottam, 2005). This would appear to identify a rationale for the apparent lack of complaints against adjudicators.

Cummins (2008), who has been critical of the quality of some adjudicators, produced and delivered a paper at the Society of Construction Law International Conference within which she considered the risks associated with obtaining an adjudicator's decision and stated *'There is an upside and a downside to adjudication. The downside is that there is an increased risk of getting a 'wrong' decision, as compared with arbitration or litigation. The upside is that 'the decision' will usually be obtained more quickly and more cheaply than in arbitration or court proceedings. That is the trade off.'*

Kirkham, who had also commented upon the quality of the work of some adjudicators, had put forward a different comparison in 2004, noting that a construction company director had stated that he preferred to have a wrong but cheap adjudication decision, rather than a wrong but expensive arbitration award.

The quality of adjudicators might well influence the decision insofar as a poor quality adjudicator is perhaps more likely to make mistakes. However, such a suggestion needs to be balanced with the work of the Adjudication Reporting Centre (2009) which reports that complaints against adjudicators are few and even fewer are upheld. Milligan (2008) comments that according to the records maintained by the Adjudication Reporting Centre no complaints against adjudications were upheld in 2008.

Bessey (2002) suggests that the problem lies with the limited time scale provided for by Statutory Adjudication, he considers that the time scale for the making of a decision is often inadequate and that in turn can lead to

poor quality decisions being made by adjudicators. Bessey concluded by stating that *'The cause of the problems is the adjudication system, not the adjudicators.'* Notwithstanding such comments might well be based on experiences, but it would be preferable to rely on the structured research of the Adjudication Reporting Centre. Anecdotally it is observable that the negative comments appear to have subsided with time as the users and adjudicators have become more familiar with the Statutory Adjudication process.

Coulson (2011) provides a judges' perspective and states '*Although in my day job I only ever see those decisions that are the subject of criticism by at least one party, it is right to note that the general standard of the adjudication decisions that we see in the TCC* (Technology and Construction Court) *are of a high quality. The work that was undertaken by some of the professional bodies in the early days to train adjudicators in all aspects of the work has very definitely paid off. That high standard is often maintained despite, rather than because of, the help that the adjudicator gets from the parties: there are times when I read through the correspondence between the solicitors and the adjudicator and marvel at the way in which the adjudicator has patiently and thoroughly dealt with the points that have been raised, whether good, bad or indifferent, often in the face of unremitting criticism from one, even both parties. Occasionally, the lack of assistance or even common courtesy offered to the adjudicator by the lawyers or claims consultants is truly shocking.'*

However, Bingham (2011) comments that *'Too many adjudicators are out of touch and, frankly, incompetent…too be blunt, there are an awful lot of adjudicators who have passed their sell by date. Worse, they don't even know how incompetent they are.'* He extends further and concludes that *'…the position in adjudication is desperate.'*

It is interesting that two views expressed by highly experienced lawyers, whilst expressed at essentially the same time, are so remarkably different.

Lord Hamilton returned to the matter of quality of adjudicators and timescales in 2011. He suggested that the matter is twofold, the time limits can create significant difficulties and the achievement of quality in decisions run hand in hand and are of significant importance.

Lord Hamilton (2011) contrasts quality with the fact that many adjudicator's decisions end up being a final determination of the dispute, he considered that there may be a number of reasons for this. He proffers that it might be said that the reason for this is that this is demonstrable of the high quality of adjudicator's decisions, so much so that both parties are satisfied with what the adjudicator has done and see no reason to take the matter further. Although he makes reference to the work by the Adjudication Reporting Centre noting that complaints against adjudicators have been very low, he suggests that satisfaction with the adjudicator's performance and decision may be too comfortable an explanation. Hamilton continues to suggest that adjudication is costly and it might simply be that the parties are unwilling to expend further funds on having the matter heard afresh. Hamilton appears to suggest that satisfaction with the quality of adjudicators may not be as high as anticipated. He concludes that by virtue of the timescale and the fact that many decisions are rendered final that '*a very high standard of competence and diligence is required of adjudicators.'*

Bingham (2012) revisits the quality issue and comments that *'...We are demanding of adjudication, in short time, high quality and accurate decisions so that disputes do not come round again to be fought in litigation, because that's too expensive and too time consuming...The demand is for adjudicators with qualifications and skills of a very high order. In other words, down here in the trenches we are looking for the right answer in one hell of a short time with a kit bag full of short cuts. So be it.'*

3.3.12 Legally Qualified or Not

Molloy (2011) and Minogue (2011) have expressed views on whether adjudicators should be legally qualified and/or whether they should take legal advice if they are not so qualified. One school of thought suggests that legally qualified adjudicators make more predictable, deliberative decisions and yet some legally qualified adjudicators suggest that it makes no difference whether an adjudicator is legally qualified or not. One can foresee that this is a factor that could be tested.

3.3.13 Proactive v. Passive Approach

Aeberli (2005) notes that an adjudicator can chose whether to be proactive or passive in their approach to decision-making. Aeberli notes that this could

impact the parties in their chances of success. If a proactive approach is taken, the adjudicator takes the initiative in ascertaining the facts and the law. If a passive approach is adopted then the adjudicator relies on the parties to make their cases and establish the facts and the law for him/her to consider. The approach adopted is likely to impact the predictability of a decision insofar that one approach could favour one party more than the other.

3.3.14 Prejudice or Bias

Kirkham presented a paper to the Adjudication Society in October 2007 entitled '*Fairness in decision making'* within which she stated *'(As adjudicator) it goes without saying that you should try to put your prejudices behind you. You may be more successful in this if you face your prejudices rather than try and push them to the back of your mind and pretend that they don't exist.'* Interestingly Kirkham as a judge was prepared to suggest that prejudices (or if one prefers, bias) might well exist in adjudication decision-making. It is difficult to consider how or whether this might be effectively predicted.

Kirkham expands and considers that *'One of the most difficult situations for a decision maker is when he is tempted to prefer one witness' version to another's based only on the impression that the witness gave. Take care: that approach is entirely subjective, and very susceptible to bias.'* That is interesting as the courts have been very keen to ensure that bias does not and is seen not to be apparent in Statutory Adjudication.

3.3.15 Unconscious Bias

Bingham (2005) suggests that bias exists in adjudicators and in many instances, they don't even realise. Bingham considers that unconscious bias is unavoidable. It is foreseeable that this would contribute to the unpredictable nature of adjudication.

3.3.16 The Potential for 'Customer Building'

Further Bingham (2011) suggests that bias might well exist as an adjudicator might be tempted to 'customer build' towards clients that are frequently in adjudication and are therefore able to provide further work, or might utilise other services provided by the adjudicator such as acting as mediator or expert witness. For the purposes of this research it is likely to be possible to

establish which party (or perhaps both) an adjudicator is more likely to gain work from by reference to previous decisions.

3.3.17 The Dispute

3.3.18 Complex Disputes

The complexity of a dispute has been identified as a potential factor in the predictability of an adjudication. Coulson (2005) suggests that some disputes may be too complex for adjudication. Franklin (2005) agrees and considers that the complex nature of a dispute may render adjudication unpredictable. Bingham (2006) considers that any dispute, no matter how complex, can be satisfactorily resolved in adjudication. Agapiou (2013) links complexity of the dispute to the applicable timescale and suggests that a complex dispute decided in a short timescale is likely to be difficult to predict.

3.3.19 Simple Disputes

Franklin (2005) avers that adjudication was set up to deal with simple disputes and it is a more satisfactory process for simple disputes rather than complex ones. In turn, one might suggest that the outcome of a simple dispute should be more predictable.

3.320 Verbal or Part Verbal Contracts

Entwistle (2012) notes that since the enactment of the Local Democracy, Economic Development and Construction Act 2009 it has been permissible to refer verbal or part verbal contracts to Statutory Adjudication. Entwistle suggests that this places a significant evidential burden upon the parties and the adjudicator in seeking to decide the dispute. It will inconsequence be challenging and is likely to lead to decisions that are more difficult to predict. Such a factor would appear to be based upon a comprehendible rationale that could be tested in due course.

3.3.21 The Parties or Their Representatives

3.3.22 The Quality of the Submissions by the Parties

Practicing adjudicators suggest that a factor that impacts upon decisions by adjudicators is the quality of the submissions by the parties. Entwistle (2012) identifies that submissions are often lacking and hurriedly put together. Molloy (2012) suggests that the parties should not expect the adjudicator to search

through their submissions to identify their respective cases and supporting documents. Molloy (2012) suggests that the parties could do much to improve their chances of success. Such a factor is likely to be one that might influence an adjudicator in his/her decision-making.

3.3.23 Expert Reports

Anecdotally some commentators suggest that the presentation of an expert report to support a party's case in adjudication is a factor that might influence an adjudicator in reaching his/her decision. The rationale suggested is that an adjudicator might not want to decide against a fellow expert. However, there could be expert reports supporting both sides of the argument and therefore further research as to the impact of such expert reports is likely to be valid and assist in developing the current level of understanding.

3.3.24 The First and Last Word

The referring party has the first word as they issue the Notice of Adjudication and the Referral Notice. They also generally have the benefit of not being limited in time to draft their initial documentation. This is a factor that some suggest leads to the referring party being more successful in adjudication (Coulson, 2007). However, the last word may fall to either the referring or responding party and some commentators suggest that having the last word is powerful insomuch that it is fresh in the adjudicator's mind. Such factors might have an impact upon an adjudicator's decision and can be tested by reference to previously made decisions.

3.3.25 The Extent of Submissions

Molloy (2012) considers that the parties to an adjudication can submit too much information. Information that is repetitive and/or irrelevant and that leaves little time for decision-making as the adjudicator is bound to read it. However, one might suggest that making such submissions could appear to add weight to a party's case; the sheer volume suggests that there must be a case to answer. As a factor, the extent of submissions might foreseeably be measurable from decisions.

3.3.26 The Selection of Party Representatives

Coulson (2011) identifies that both lawyers and claims consultants can lack courtesy when dealing with adjudicators. Entwistle (2012) considers that the

approach of some representatives can be challenging. Bingham (2006) notes that reputation of representatives and their background can be significant, a good reputation can be very important. Such submissions by practicing adjudicators lends itself to recognition of a valid factor that might impact upon an adjudicator's decision.

This section of the Literature Review serves to meet objective 1 (c) to conduct a detailed Literature Review to establish the current level of knowledge in relation to factors that might influence decisions in formal construction dispute resolution and particularly Statutory Adjudication.

3.4 WHAT PREVIOUS RESEARCH HAS BEEN UNDERTAKEN IN REGARD TO STATUTORY ADJUDICATION?

Kennedy and Milligan (2010) have worked with the Adjudication Reporting Centre at Glasgow Caledonian University and their research has led to the publishing of 10 reports concerned with the *'...progress of adjudication based upon returned questionnaires from Adjudicator Nominating Bodies (ANBs).'*

The research that they have conducted is interesting and tracks the progress of Statutory Adjudication over a number of years. Report number 10 (up to April, 2008) considers:

- The number of adjudications;
- Seasonal Trends as to when the number of referrals increases and decreases;
- The number of adjudicators registered with Adjudicator nominating Bodies;
- The primary discipline of adjudicators;
- The performance of adjudicators;
- Sources of appointment of adjudicators;
- Comparison of successful parties in adjudicators' decisions;
- The primary subjects of the disputes;
- The value of disputes referred to adjudication;
- The parties engaged in a dispute referred to adjudication;

- Compliance with time limits;
- The number of adjudications proceeding to a decision;
- Challenges to adjudicators' appointments;
- When the adjudication process is initiated; and
- Hourly fees charged by adjudicators.

Subsequent work by Trushell *et al* (2012) also at Glasgow Caledonian University concluded reports numbered 11 and 12. These reports consider all of the same areas with the exception of performance of adjudicators and the sources of appointment of adjudicators and therefore provide for an interesting comparison between April 2008 and October 2012. As of August 2017, there had not been a subsequent report, the reason(s) for this are unknown. Each subject heading is reviewed below, commentary on report No.10 is followed (where reported upon) by commentary on report No. 12 as a comparison.

3.4.1 Identification of Years Contrast With Calendar Periods

The following years are utilised to describe calendar periods within the Glasgow Caledonian University publications:

Table of Year v. calendar period mapping

Year Number	Calendar Period
Year 2	May 1999 – April 2000
Year 3	May 2000 – April 2001
Year 4	May 2001 – April 2002
Year 5	May 2002 – April 2003
Year 6	May 2003 – April 2004
Year 7	May 2004 – April 2005
Year 8	May 2005 – April 2006
Year 9	May 2006 – April 2007
Year 10	May 2007 – April 2008
Year 11	May 2008 – April 2009
Year 12	May 2009 – April 2010
Year 13	May 2010 – April 2011
Year 14	May 2011 – April 2012

Table 3.1 Year v. calendar period mapping

3.4.2 The Number of Adjudications

The research demonstrates, at page 2 of report No. 10, how many adjudications there have been (as reported by participating Adjudicator Nominating Bodies only) across many years (since enactment of the Housing Grants, Construction and Regeneration Act 1996 (as amended)) as set out pictorially in Figure 3.1 below:

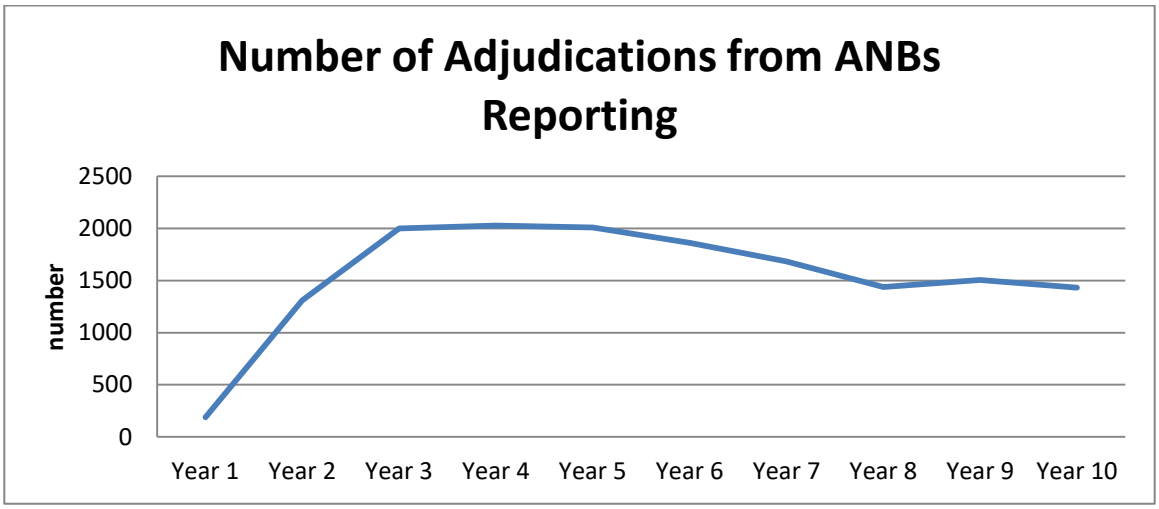

Figure 3.1 Number of Adjudications from ANBs Reporting to April 2008

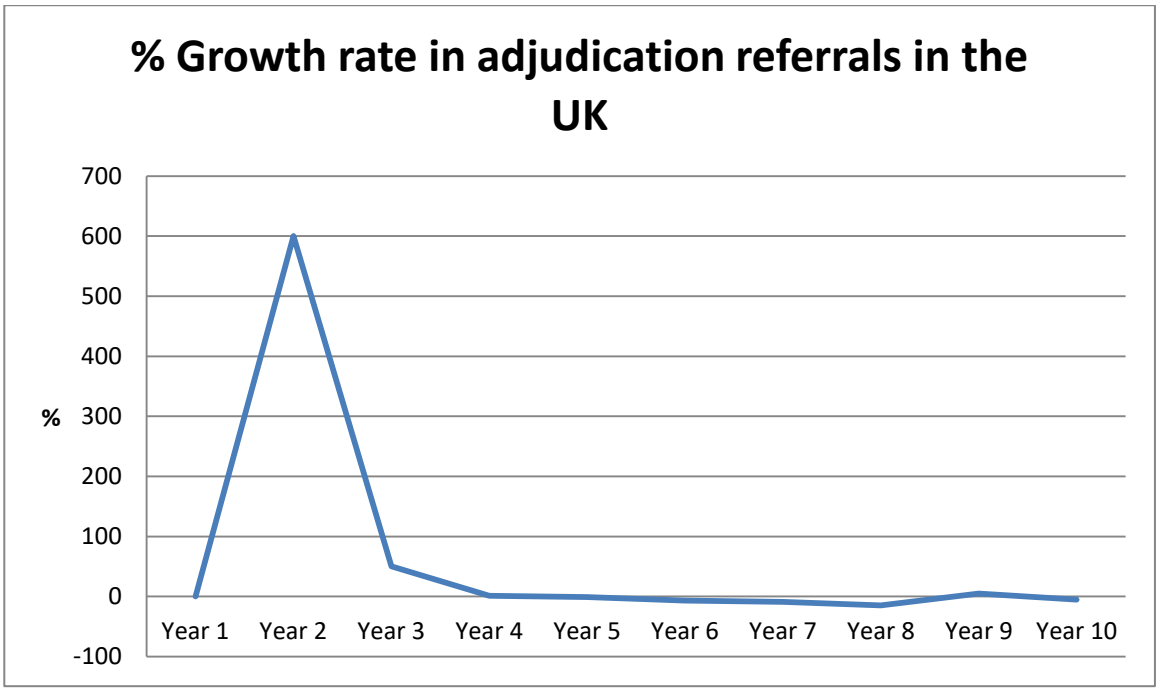

Figure 3.2 Percentage Growth rate in adjudication referrals in the UK to April 2008

As can be seen from Figure 3.2 there was a massive percentage increase in the year 1999 – 2000 (600%) and this can be attributed to the construction

industry gaining confidence in Statutory Adjudication due to enforcement by the courts (Macob Civil Engineering Limited v. Morrison Construction Ltd (1999) BLR 93). Growth or stability was experienced until 2002 and then there has been a steady decline in the number of cases with the exception of May 2006 to April 2007 whereby there was a small increase. The decrease possibly arises, as cases have not been pursued due to learning from judgments issued by the courts.

Report No. 12 demonstrates that there was a 21% increase in referrals between May 2008 and April 2009. This was however followed by significant decline between May 2009 and April 2011 with only a small increase by April 2012 bringing the number of referrals to just 1093 as set out in Figure 3.3 below:

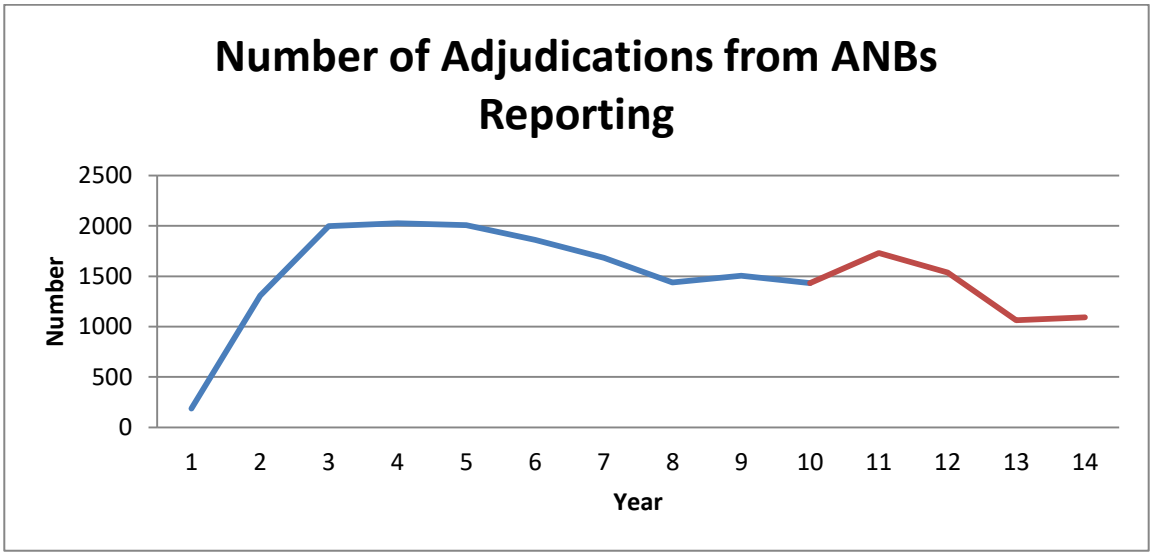

Figure 3.3 Number of Adjudications from ANBs Reporting to April 2012

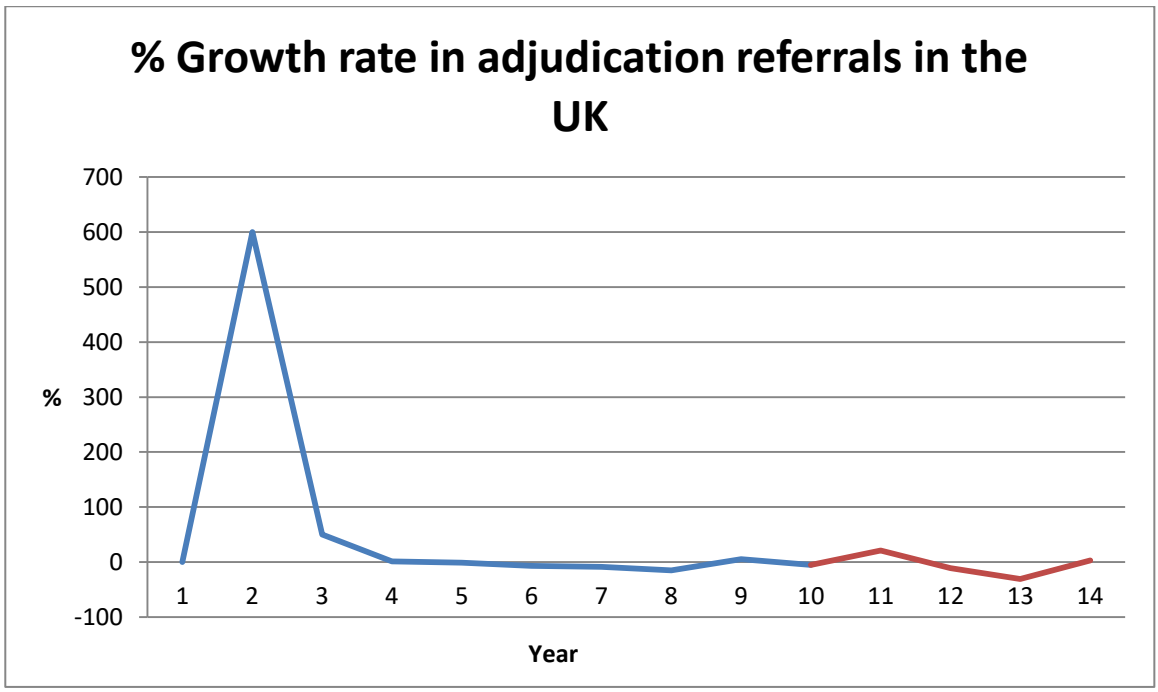

Figure 3.4 Percentage Growth rate in adjudication referrals in the UK to April 2012

It would appear that Statutory Adjudication is less popular; however, it is still the most commonly used formal dispute resolution process in the construction industry within the UK currently.

3.4.3 The Number of Adjudicators Registered With Adjudicator Nominating Bodies

The research demonstrates at page 5 of report No. 10, how many adjudicators there are registered with differing Adjudicator Nominating Bodies as set out in Figure 3.5 below:

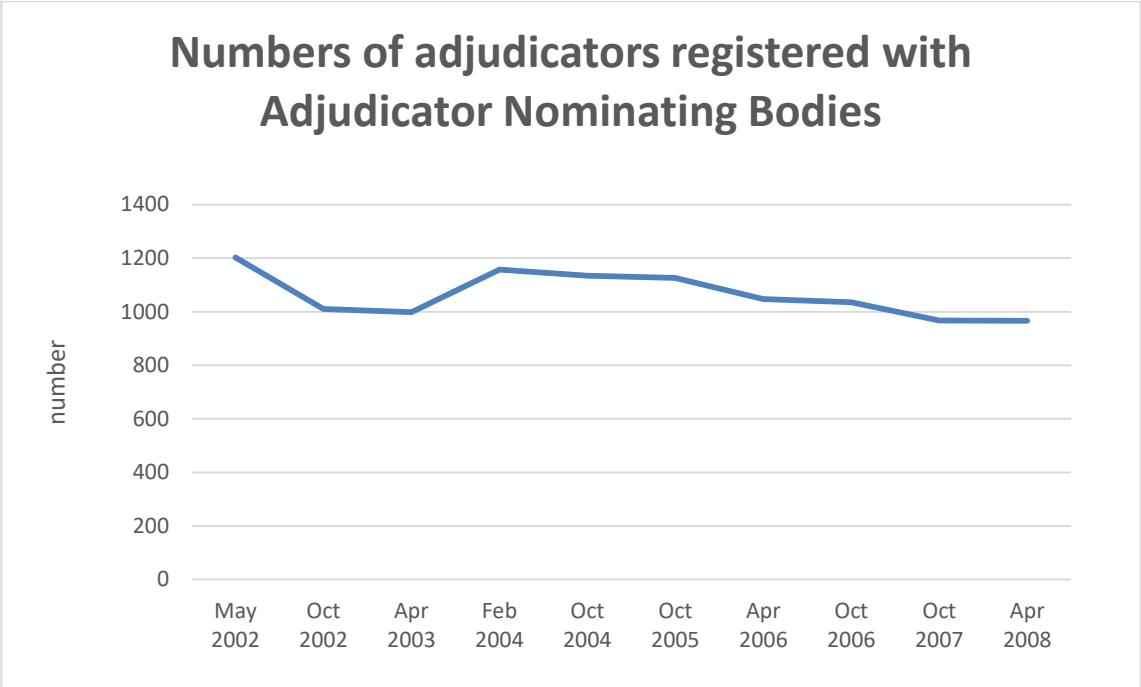

Figure 3.5 Numbers of adjudicators registered with Adjudicator Nominating Bodies to April 2008

As can be seen from the above it is evident that whilst there has been some variation it has typically remained in the order of 1000 registrations for a number of years, albeit that many adjudicators are registered with more than one Adjudicator Nominating Body. The research would have provided more clarity if it identified the actual number of adjudicators, rather than the number of registrations.

Report No. 12 demonstrates that there was a fall in the number of registrations after report No. 10. By April 2011 there were only 825 registrations albeit that this rose again by April 2012 to 915. Registrations are typically relatively stable with the most well-known ANBs such as the Royal Institution of Chartered Surveyors (RICS) and Royal Institute of British Architects (RIBA).

However, in recent times it can be seen that for example the Technology and Construction Solicitors Association registrations had reduced from circa 140 to circa 70. The reasoning suggested is that this is discrete quality control by ANBs.

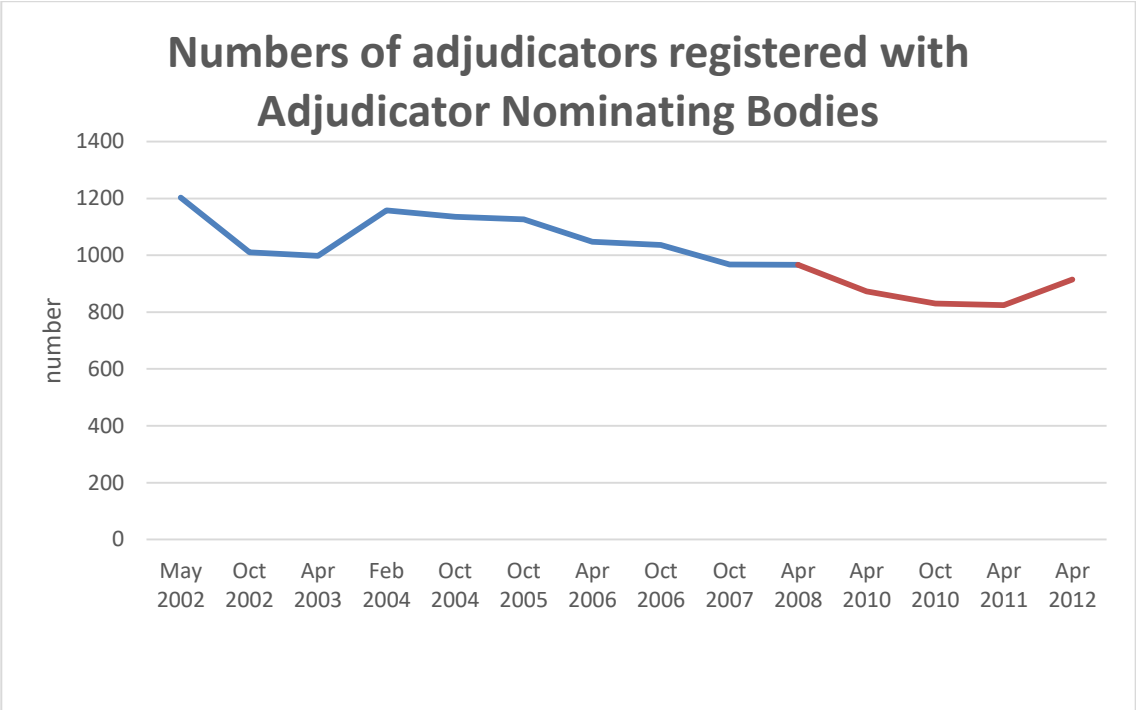

Figure 3.6 Numbers of adjudicators registered with Adjudicator Nominating Bodies to April 2012

3.4.4 The Primary Discipline of Adjudicators

The research demonstrates at page 6 of report No. 10, the primary professional discipline of the adjudicators registered with them as set out in Figure 3.7 below:

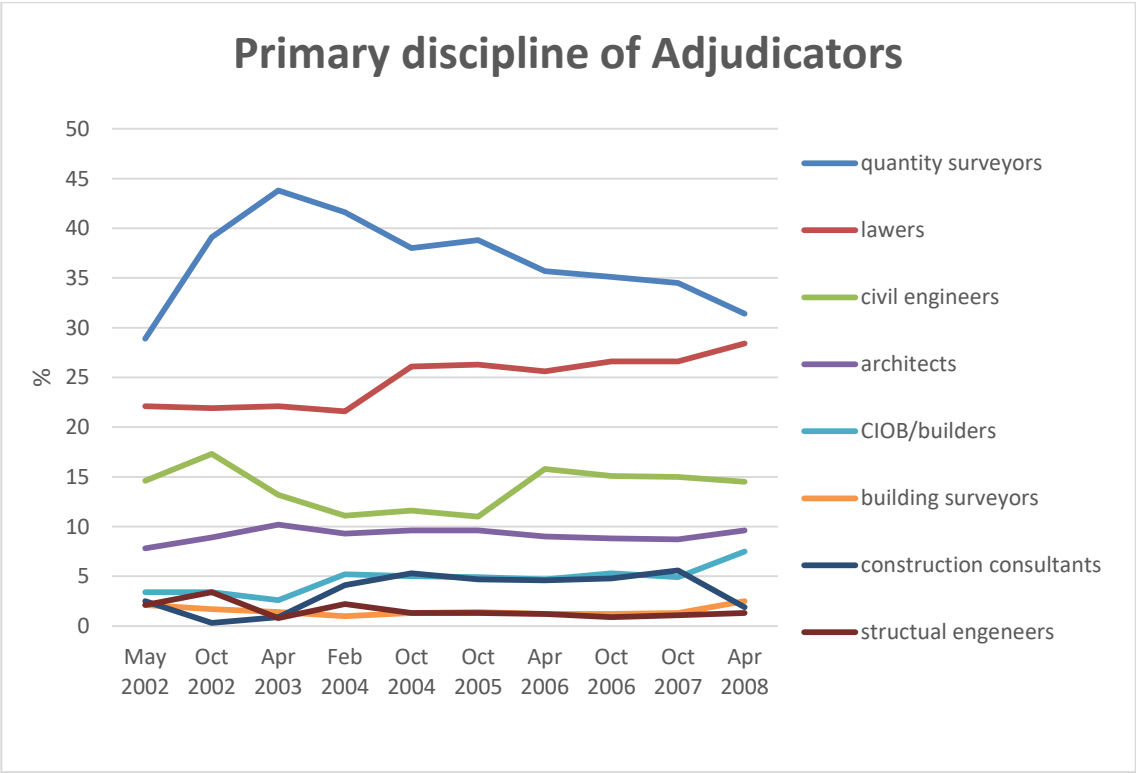

Figure 3.7 Primary discipline of Adjudicators to April 2008

As can be seen from the above it is evident that quantity surveyors, lawyers and civil engineers have consistently remained the primary professional disciplines and in that order. However, it is also evident that the percentage of quantity surveyors has reduced in recent years and lawyers have generally increased. It would seem that lawyers have increased reasonably steadily. This may be explained by the more complex legal arguments presented to adjudication. However, the research does not offer an explanation.

Report No. 12 demonstrates that lawyers have continued to increase their presence and are just as likely (35%) as quantity surveyors to be the appointed adjudicator. Civil Engineers are now less likely to be appointed at 11.3%. It would appear that lawyers have migrated to Statutory Adjudication from other forums such as litigation and domestic arbitration as there has simply been less work due to the number of adjudications. The Primary discipline of adjudicators from report No. 12 is set out in Figure 3.8 below:

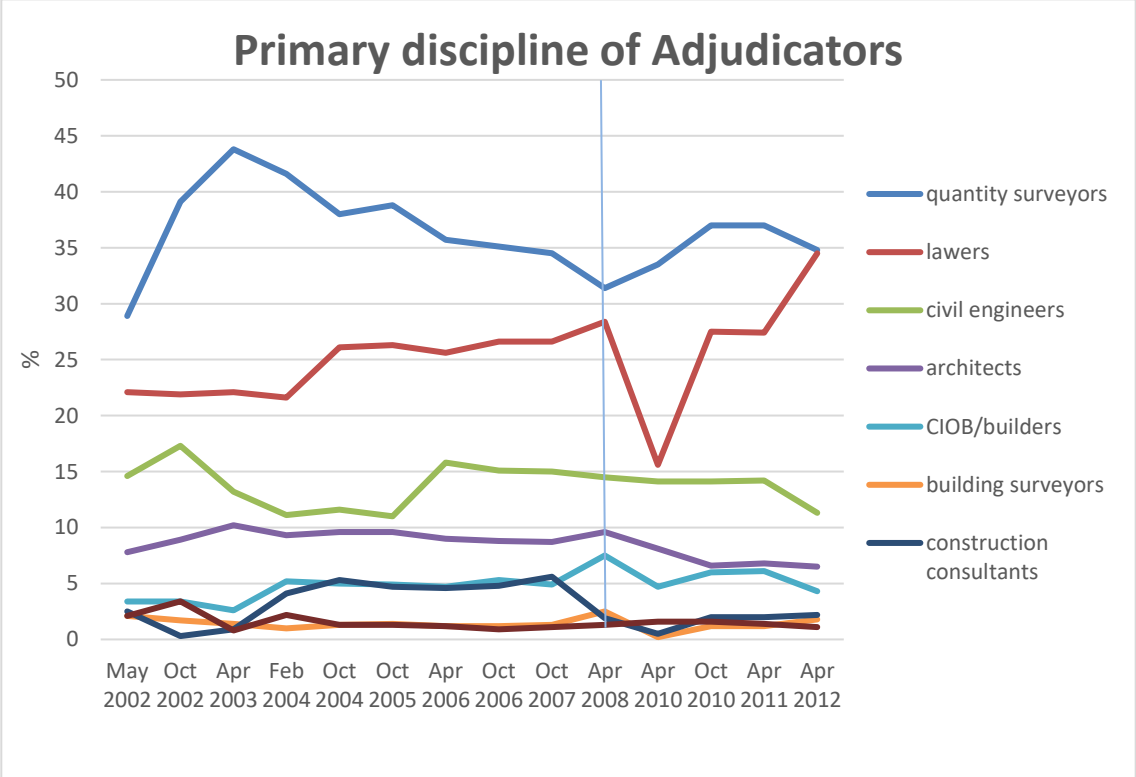

Figure 3.8 Primary discipline of Adjudicators to April 2012

3.4.5 The Performance of Adjudicators

The research demonstrates at page 8 of report No. 10, the number of complaints made and those upheld against adjudicators as a percentage as set out in Figure 3.9 below:

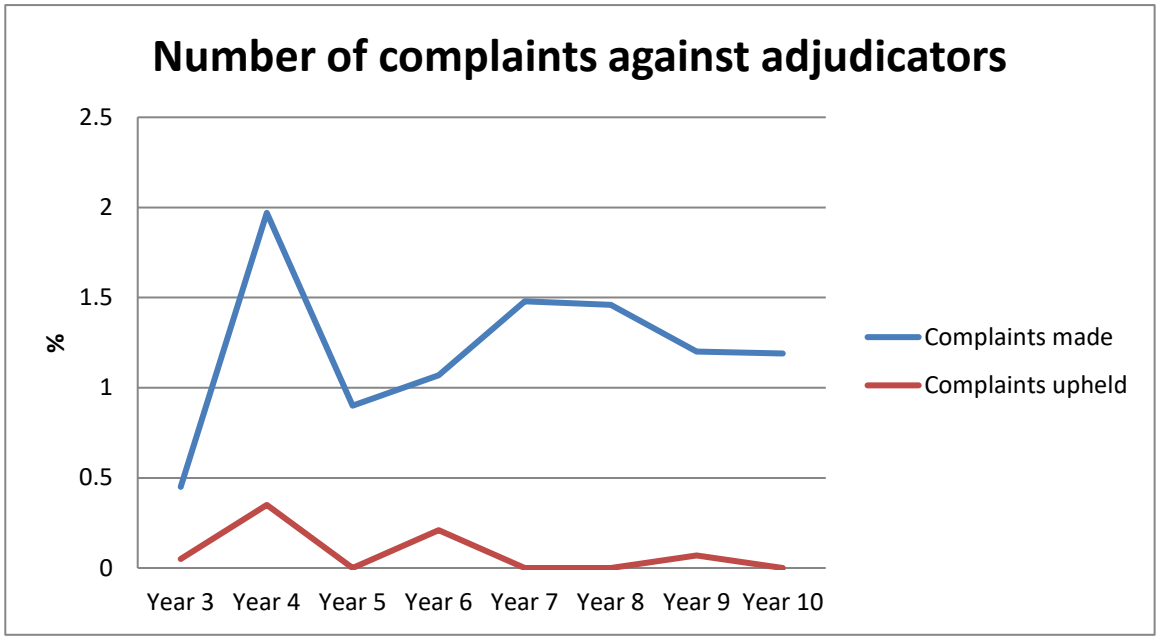

Figure 3.9 Number of complaints against adjudicators

As can be seen from the above it is evident that few complaints are made against adjudicators and very few are actually upheld. This would appear to suggest that the parties are generally satisfied with the performance of adjudicators or that a party or the parties consider that there is too much commercial risk in complaint, particularly as so few complaints are upheld.

Report No. 12 does not report on the number of complaints against adjudicators. It would appear likely that this was discontinued due to the lack of complaints actually being upheld.

3.4.6 Sources of Appointment of Adjudicators

The research demonstrates at page 9 of report No. 10, the sources of appointment of adjudicators as a percentage as set out in Figure 3.10 below:

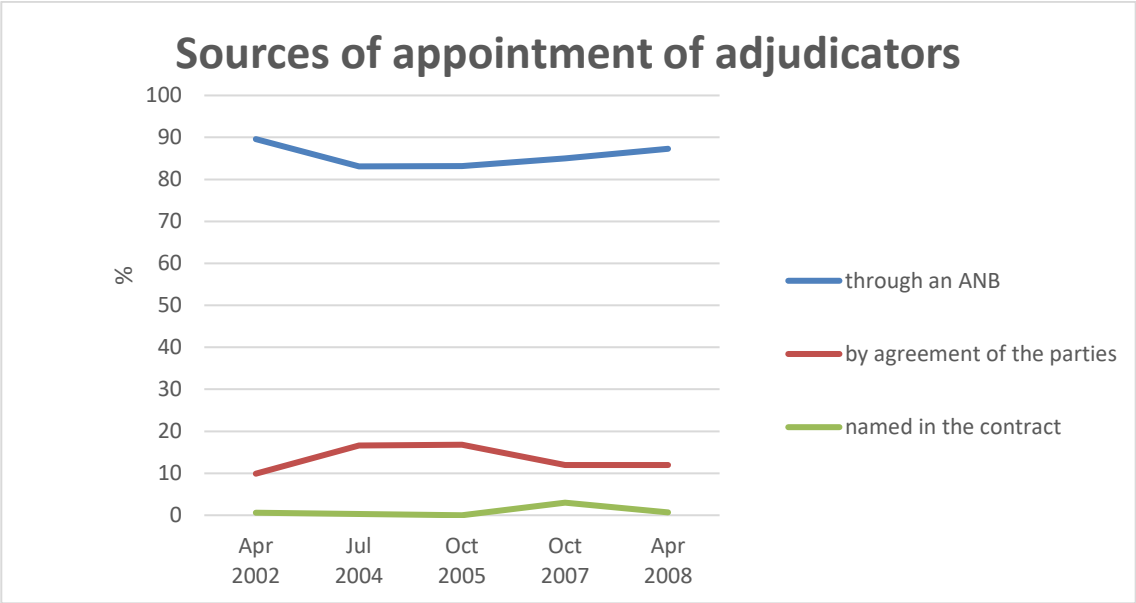

Figure 3.10 Sources of appointment of adjudicators

As can be seen from the above it is evident that the vast majority of appointments come from Adjudicator Nominating Bodies and this has remained reasonably consistent. The other main source of appointment is by agreement between the parties, but in contrast to Adjudicator Nominating Bodies, this is a relatively minor source.

Report No. 12 does not report on the sources of appointment of adjudicators. It would appear likely that this was discontinued, as ANBs remain a significant leading source of appointment of adjudicators.

3.4.7 Comparison of Successful Parties in Adjudicators' Decisions

The research demonstrates at page 10 of report No. 10, the likelihood of success as a Claimant or Respondent and also seeks to highlight the likelihood of a split decision. All are expressed as percentages as set out in Figure 3.11 below:

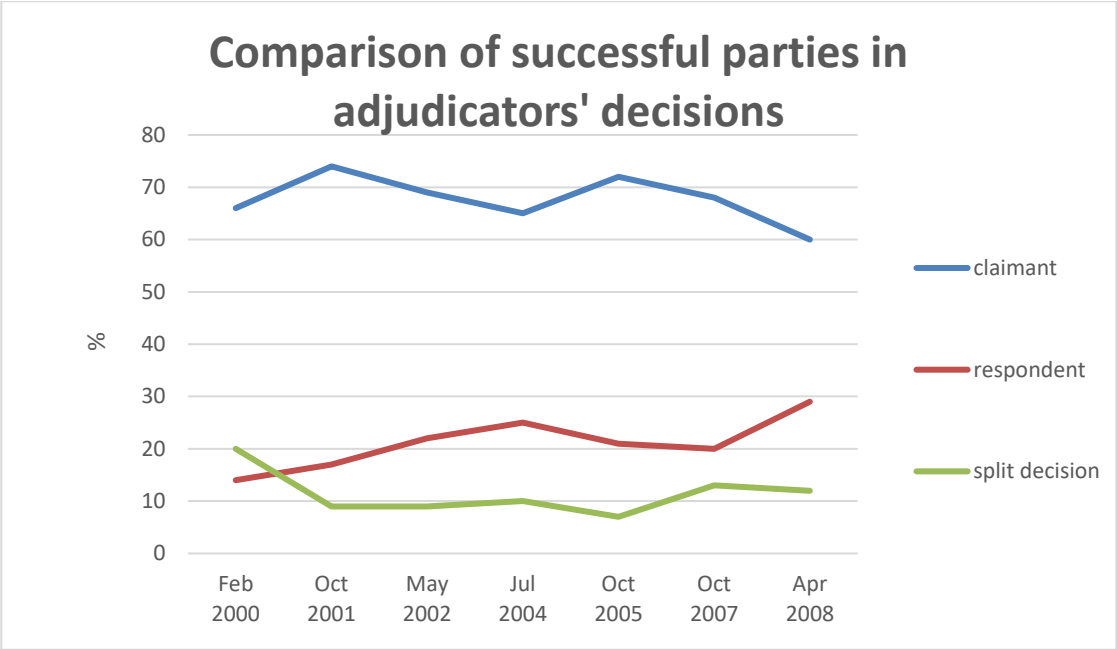

Figure 3.11 Comparison of successful parties in adjudicators' decisions to April 2008

As can be seen from the above it is evident that one is much more likely to be successful as the Claimant rather than the Respondent, with the exception of the year 2008 where the likelihood of success for the Claimant reduces. It is also evident that the possibility of a split decision is a relatively low percentage. This is extremely interesting and it is a pity that the data is not considered analytically or by reference to reasoning. It would seem that the Respondents did have a much more successful year in 2008 and by contrast, the success of the Claimants was reduced. It will be interesting to see if this establishes any future pattern or whether this was an isolated incident.

Report No. 12 demonstrates that the Claimant is still most likely to be successful; in the last two reporting periods the success rate for the Claimant is in the region of 70% which is significant, as set out in Figure 3.12 below:

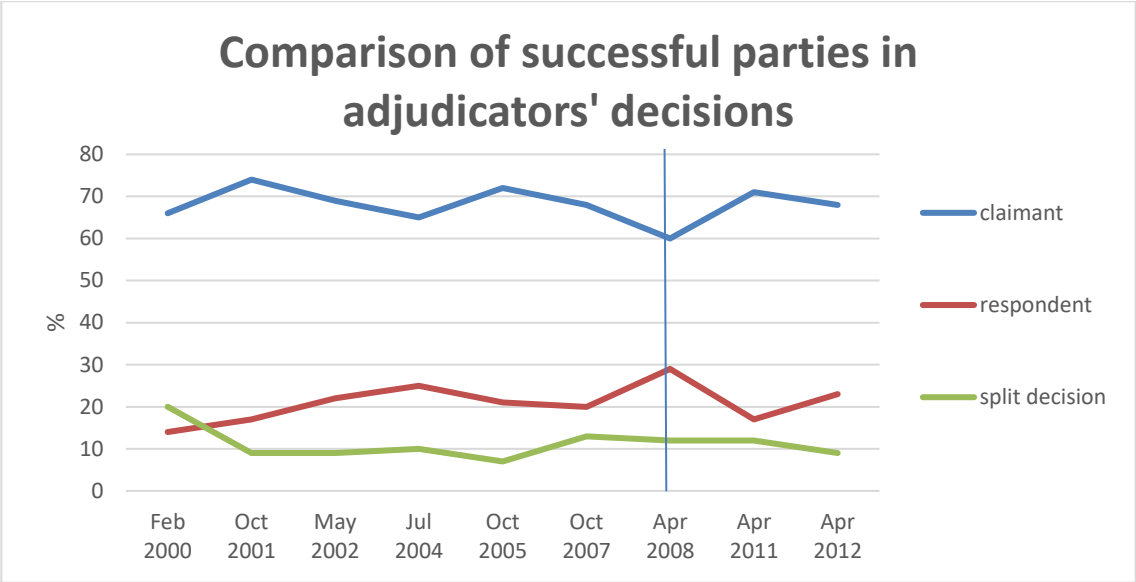

Figure 3.12 Comparison of successful parties in adjudicators' decisions to April 2012

3.4.8 Primary Subjects of the Disputes

The research demonstrates at page 11 of report No. 10, the primary subjects of the disputes referred to Statutory Adjudication under broad subject headings. All are expressed as percentages as set out in Figure 3.13 below:

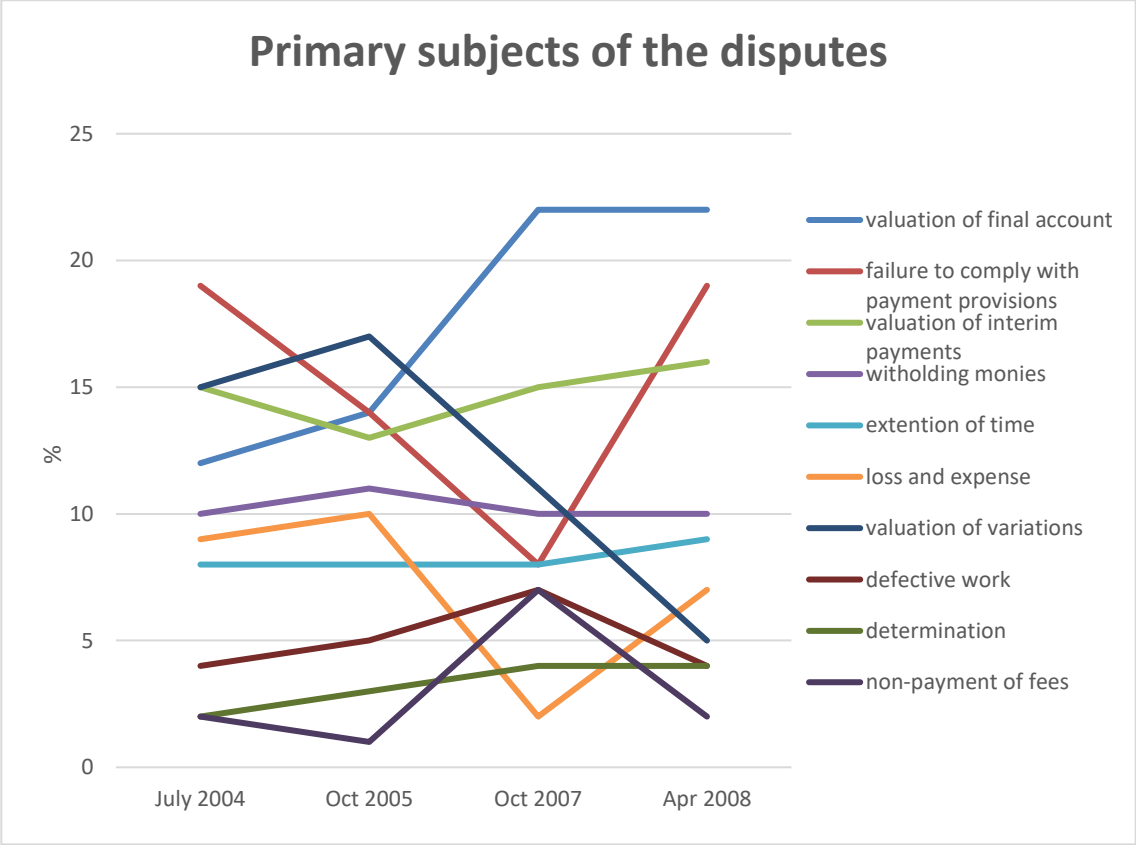

Figure 3.13 Primary subjects of the disputes to April 2008

As can be seen from Figure 3.13, it is clear that many disputes are about the valuation of the final account, which suggests that many parties still wait until the work is complete before they end up in dispute or chose to face that reality. Valuation features significantly and this runs to the heart of what was intended by Statutory Adjudication, the maintaining of cash flow. There is still a large percentage in relation to failures to comply with payment provisions and this seems to suggest that the construction industry was still failing to comprehend the payment provisions pertaining to Statutory Adjudication.

Report No. 12 demonstrates that adjudication is most commonly about money. Valuation is significant, but interim payment is the most common basis of dispute at 26% which suggests that parties do not now necessarily wait until the contracted works are complete as was most common, albeit that disputes over the final account remain significant at 17% as set out in Figure 3.14 below:

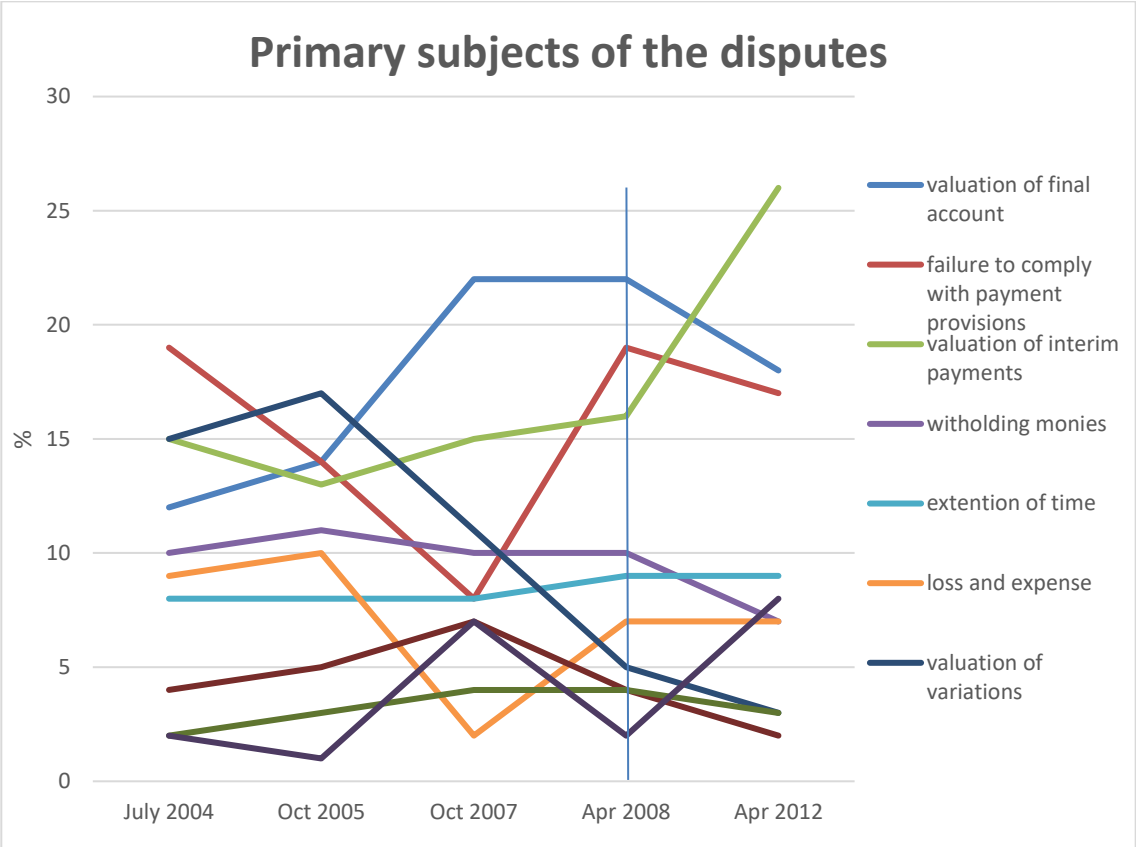

Figure 3.14 Primary subjects of the disputes to April 2012

3.4.9 The Value of Disputes Referred to Adjudication

The research demonstrates at page 12 of report No. 10, the value of disputes referred to adjudication. It divides them into broad value categories and breaks them down as percentages per year, as set out in Figure 3.15 below:

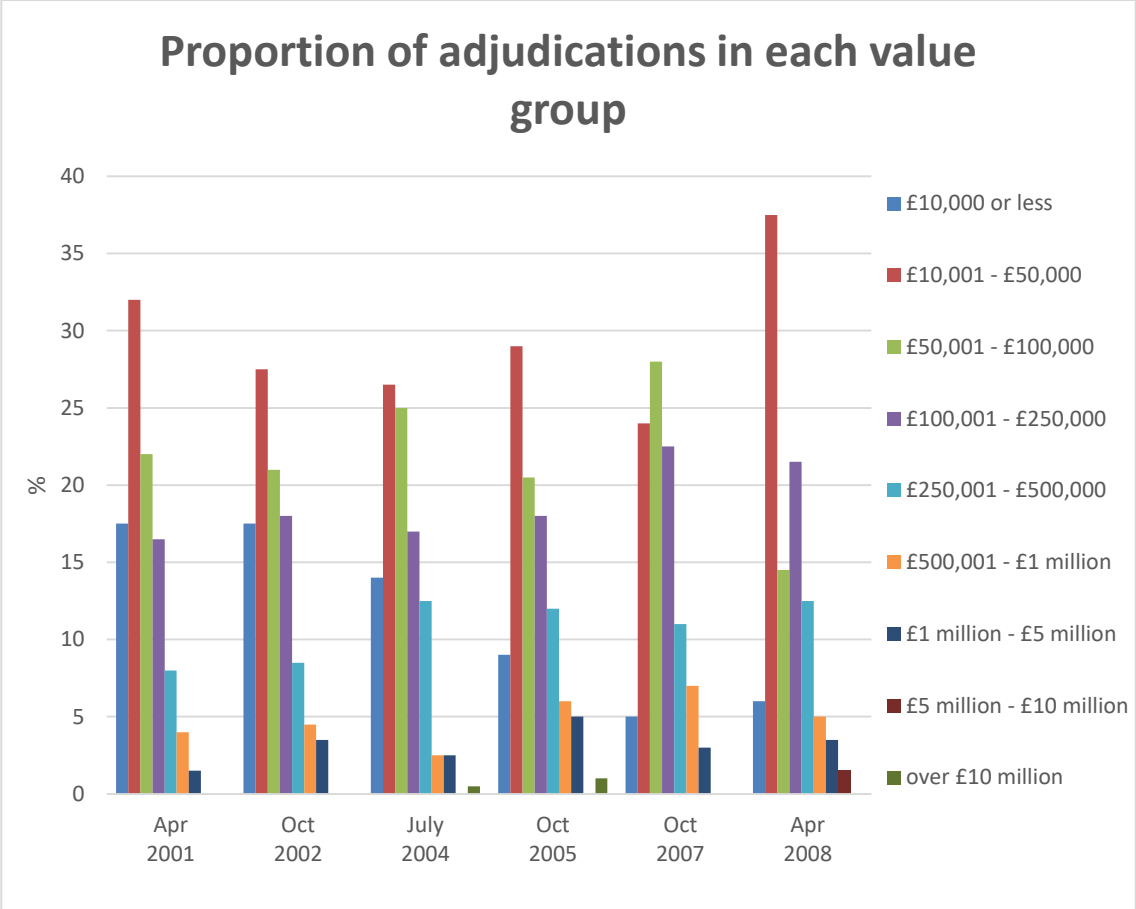

Figure 3.15 Proportion of adjudications in each value group to Aril 2008

As can be seen from Figure 3.15 it remains reasonably consistent that the disputes most often referred to Statutory Adjudication are of relatively modest value; this said there are still disputes referred that are in the millions of pounds.

Report No. 12 demonstrates a comparable set of values and remains consistent insofar that adjudicated sums are generally quite modest albeit that there was a 6% rise in the 1 – 5 million category in the last reporting period as set out in Figure 3.16 below:

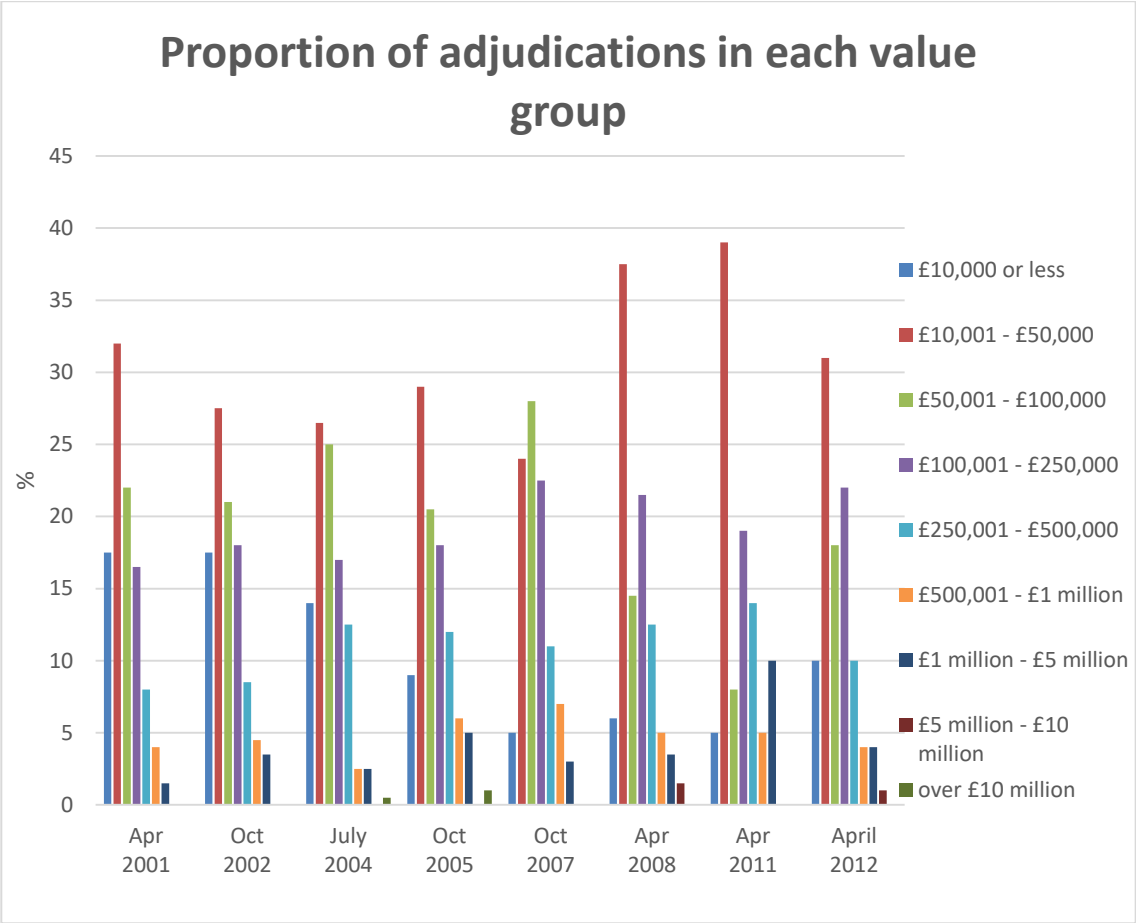

Figure 3.16 Proportion of adjudications in each value group to April 2012

3.4.10 The Parties Engaged in a Dispute Referred to Adjudication

The research demonstrates at page 13 of report No. 10, the parties most likely to be engaged in an adjudication, as set out in Figure 3.17 below:

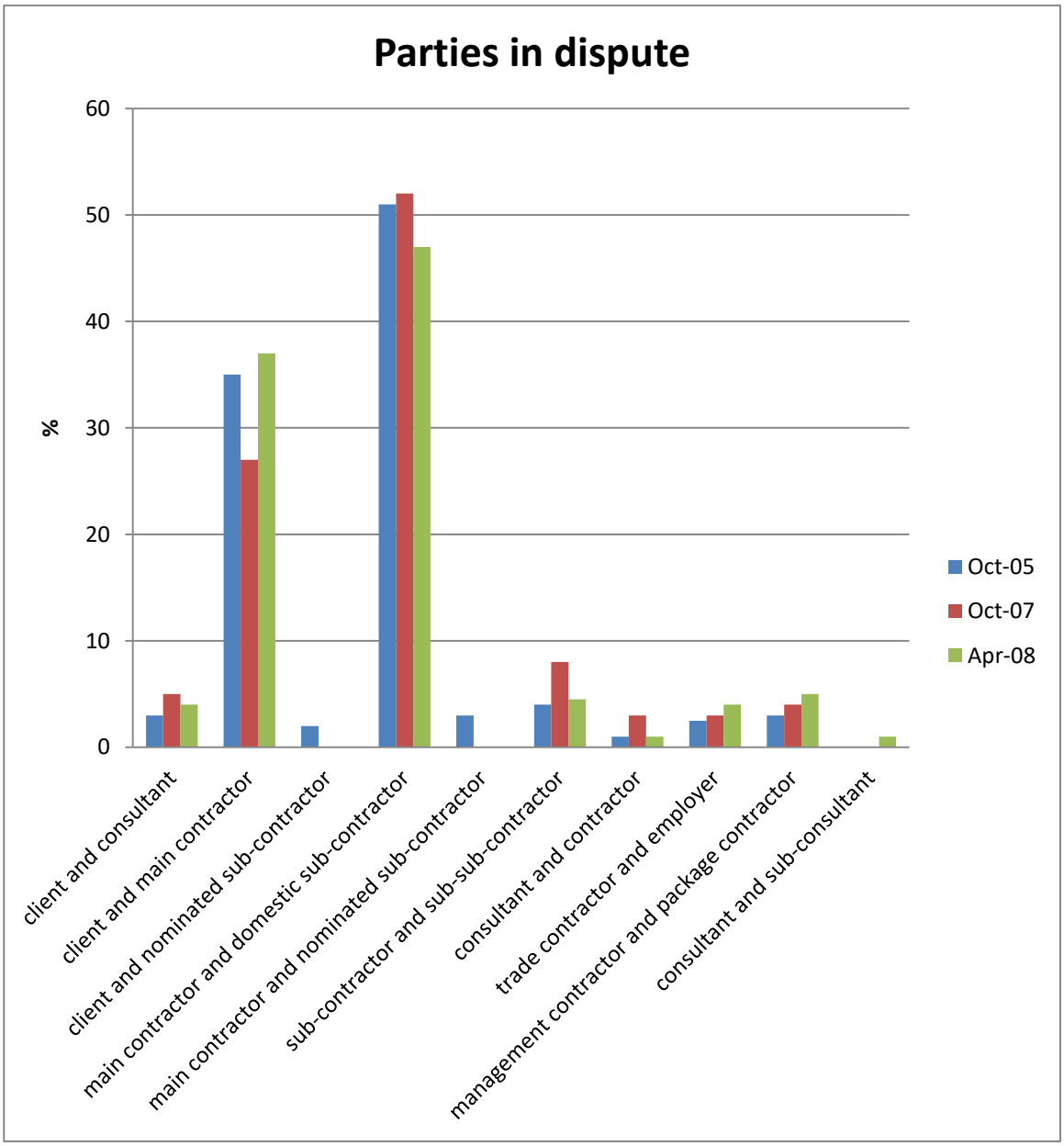

Figure 3.17 Parties in Dispute

It is clear that the parties most likely to be involved in an adjudication are either the main contractor and domestic sub-contractor or, the client and main contractor. The research directs that this is consistent with previous years and is what the industry might ordinarily expect.

Report No. 12 reports under differing categories and reduced descriptions to Report No. 10, so it is difficult to draw a comparison. However, it remains the case that the parties most likely to be involved in an adjudication will be

either the main contractor and domestic sub-contractor or the client and main contractor.

3.4.11 Compliance with Time Limits

The research demonstrates at page 15 of report No. 10, how likely it is that the adjudicator will be able to comply with the 28 day time limit or the period of 42 days as directed by legislation. It also indicates how many adjudicators take more than 42 days to reach their decision. The data is set out in Figure 3.18 below:

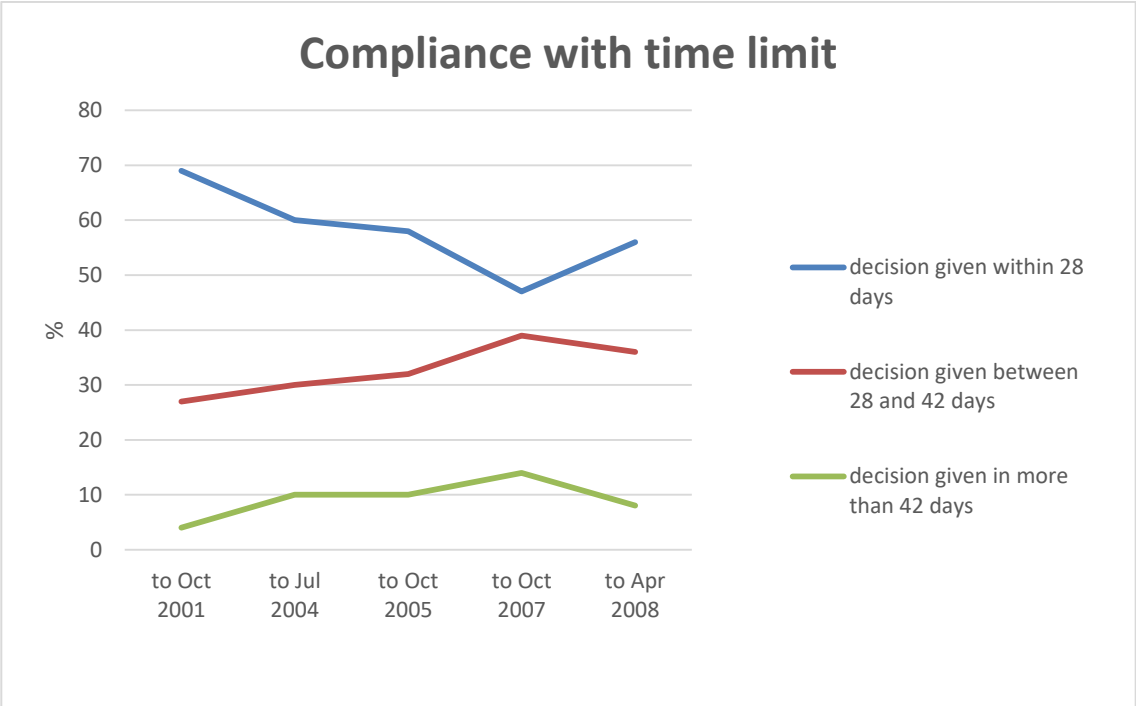

Figure 3.18 Compliance with time limit to April 2008

It appears as intended by the legislation that most decisions are reached quickly and this should enable cash to flow, even if that is on a potentially interim basis. It also appears that where matters are complex or voluminous that adjudicators will take longer and it is possible that the parties agree to extend time in the interest of achieving the right decision, rather than a quick one that may or may not be wrong, albeit this is not identified or verified by the ARC research.

Report No. 12 demonstrates that the number of decisions being issued within 28 days is declining (44%) and those taking more than 42 days are increasing (19%). This is of concern as costs would ordinarily increase and parties have to wait longer for a decision, albeit this will be influenced to some degree by

the complexity of the dispute referred and it is evident that some quite complex disputes are referred to adjudication (For example CIB Properties Ltd v. Birse Construction [2004] EWHC 2365, AWG Construction Services Ltd v. Rockingham Motor Speedway Ltd [2004] EWHC 888 (TCC) and Amec Group Ltd v. Thames Water Utilities Ltd [2010] EWHC 419). The data from report No. 12 is set out in Figure 3.19 below:

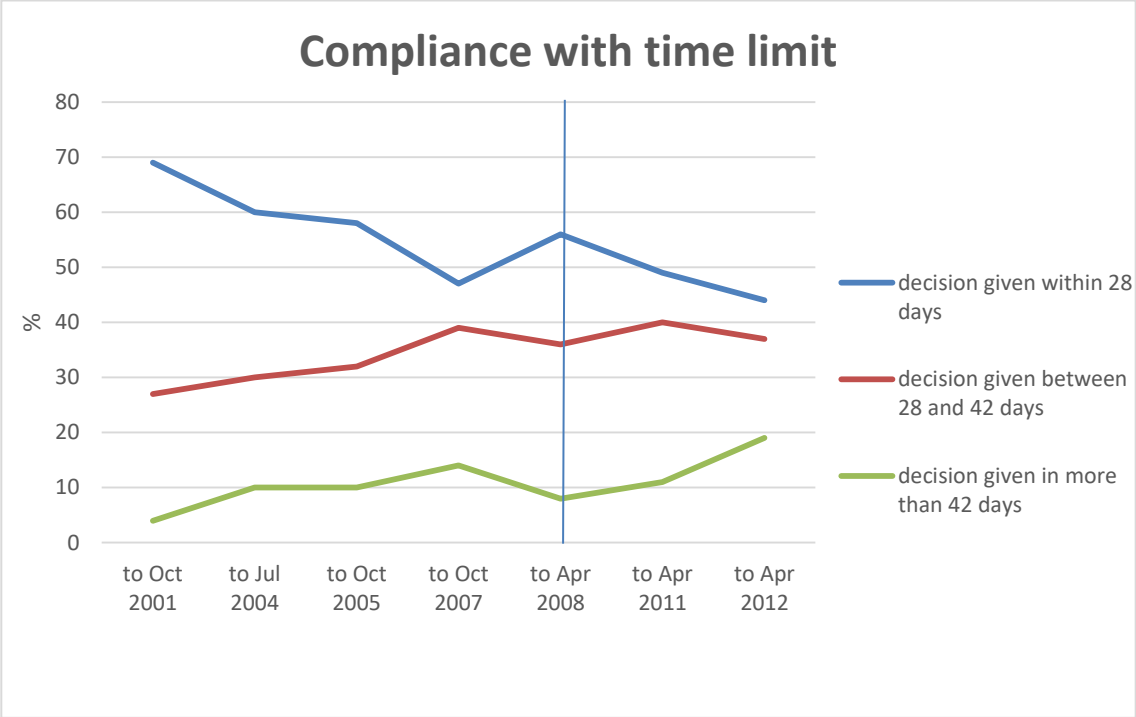

Figure 3.19 Compliance with time limit to April 2012

3.4.12 The Number of Adjudications Proceeding to a Decision

The research demonstrates at page 16 of report No. 10, how many adjudications proceed to a decision, it contrasts those with those that are abandoned, settled, or that are still on going at the time that the data is collected. The data is set out in Figure 3.20 below:

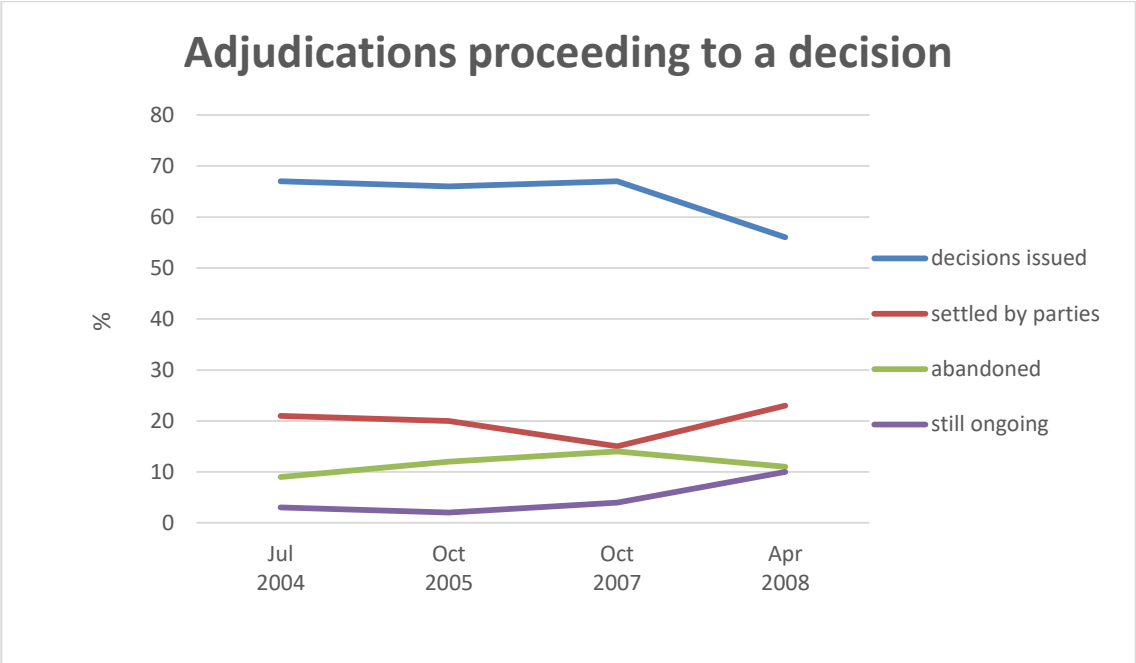

Figure 3.20 Adjudications proceeding to a decision to April 2008

As can be seen from Figure 3.20, a large number of adjudications require the reaching of a decision; averaged out over the four year reporting period 64% required a decision. On the same basis, 20% were settled by the parties and 12% were abandoned. The remaining adjudications were simply ongoing when the data was collected. It is interesting that for 32% of adjudications one or more of the parties chose to take control of the dispute and not seek a decision.

Report No. 12 demonstrates an increased proportion of adjudications required the issuing of a decision (69%); settlement by the parties was at 19% which is not dissimilar to previous years and adjudications abandoned was at 10% which again is reasonably reflective of previous years. The data is set out in Figure 3.21 below:

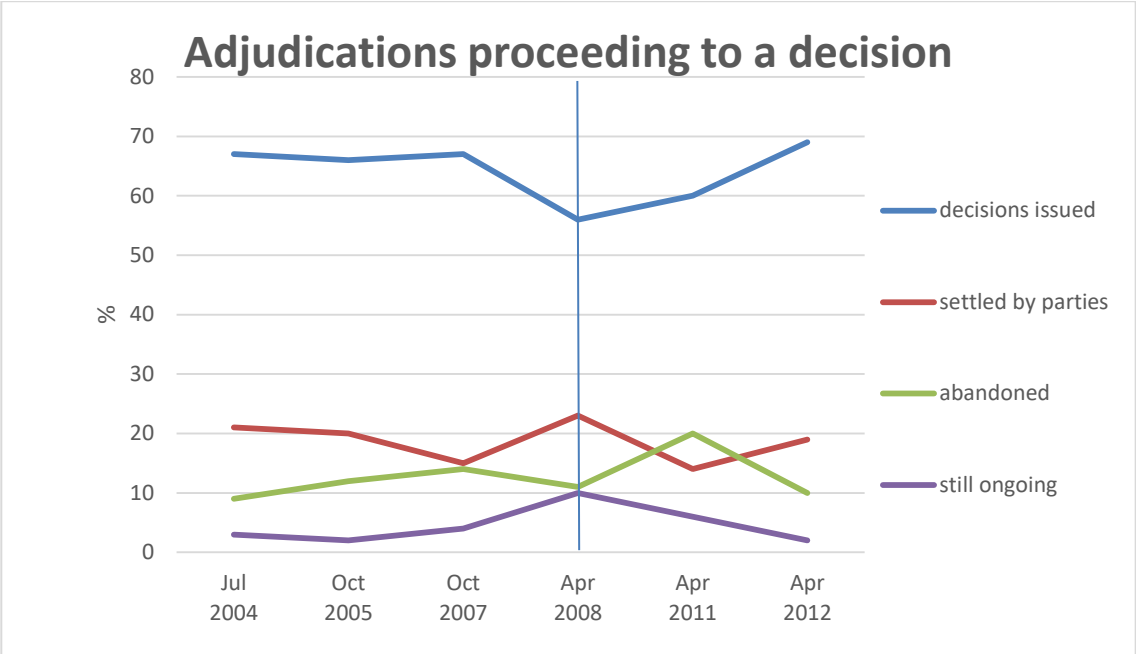

Figure 3.21 Adjudications proceeding to a decision to April 2012

3.4.13 Challenges to the Adjudicators' Appointment

The research demonstrates at page 17 of report No. 10, the number of challenges to an adjudicator's appointment based on three samples of varying size; the percentage of challenges are quite close and proportionally significant as set out in Figure 3.22 below:

Figure 3.22 Challenges to adjudicators' appointments November 2004 to April 2008

As can be seen from Figure 3.22, in excess of a third of adjudications result in a challenge to the adjudicator's appointment, the main challenge being that there is no dispute or that the dispute has not crystallized. It is interesting that the second challenge is that there is no contract in writing; this will now have fallen away as a challenge by virtue of the new legislation and so it will be interesting to see how future data reflects such a change.

Report No. 12 records challenges to adjudicators' appointments in a simplified fashion. Typically, challenges have remained at about a third albeit in the last reporting period the challenges reduced to 28% which might indicate that as case law deals with challenges, the basis for such challenges are being reduced. The data from report No. 12 is displayed in Figure 3.23 below:

Figure 3.23 Challenges to adjudicators' Appointments October 2005 - April 2012

3.4.14 When is the Adjudication Process Initiated?

The research demonstrates at page 18 of report No. 10, the percentage of adjudications that are initiated before and after practical completion as set out in Figure 3.24 below:

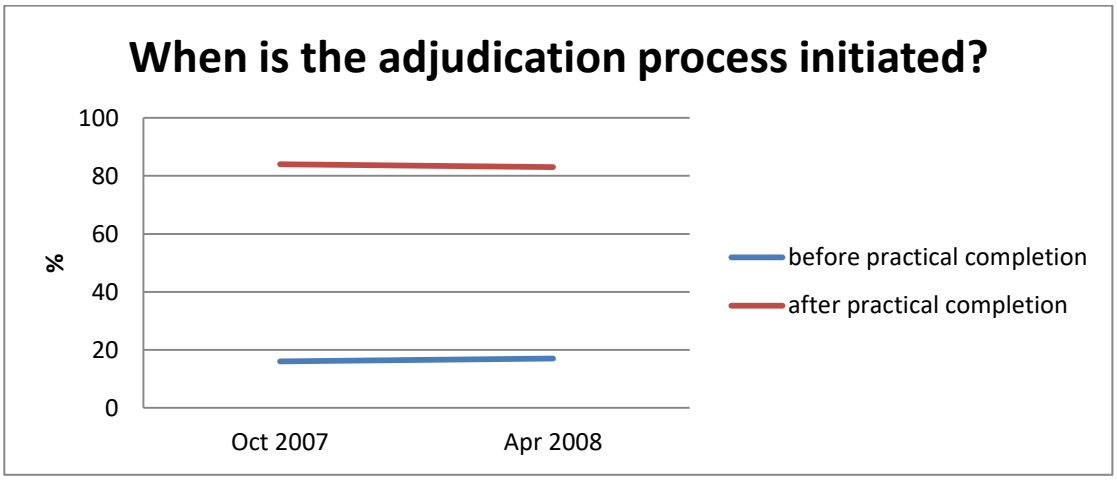

Figure 3.24 When is the adjudication process initiated?

It is observable that based on a limited sample; the vast majority of adjudications are commenced after practical completion. This is perhaps not in accord with the intention of the legislation, which sought to keep cash flowing during the currency of the work. The reasoning is not entirely clear; it may be that cultural factors are at play, the somewhat traditional approach that leaves disputes until the end or at final account stage has been adopted.

Report No. 12 does not report under this heading. It would appear that on the basis of the section headed 'Primary subjects of the disputes' that parties

are not as likely to wait until practical completion, however, this is not reported upon directly.

3.4.15 Hourly Fees Charged by Adjudicators

The research demonstrates at page 19 of report No. 10, the range of fees charged by adjudicators by comparison across a number of years as set out in Figure 3.25 below:

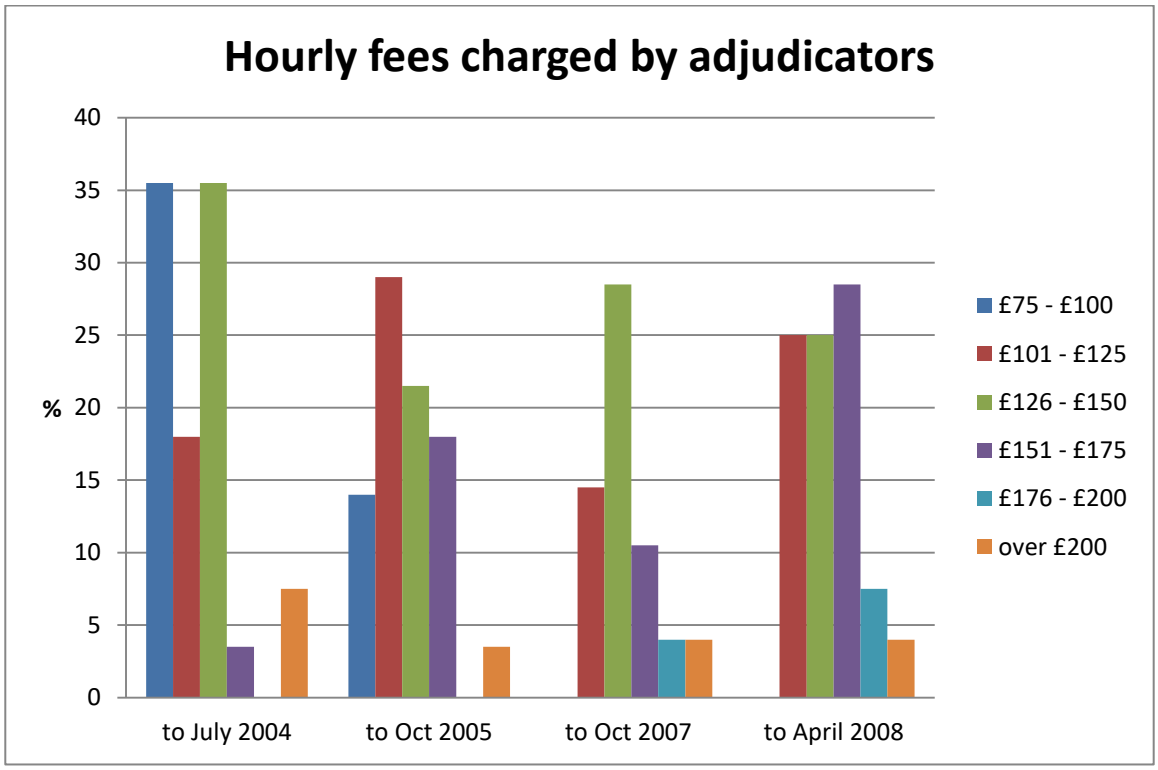

Figure 3.25 Hourly fees charged by adjudicators to April 2008

It is observable by reference to the above data that it is typical for adjudicators to charge between £100 and £175 per hour and most common, based on the latest data presented, for adjudicators to charge between £151 - £175, which given the degree of seniority of the typical adjudicator would appear to render the hourly rate reasonable. Of course, there is no indication as to efficiency, but based on the typical hourly rate it would appear that the process can be reasonably cost effective.

Report No. 12 records quite significant increases in adjudicators charging between £176 and £200 per hour and significant increases in those adjudicators charging in excess of £200 compared to report No. 10. There is also a fall in those adjudicators charging lower sums with none now

reportedly charging less than £100 per hour. The data from report No. 12 is displayed in Figure 3.26 below:

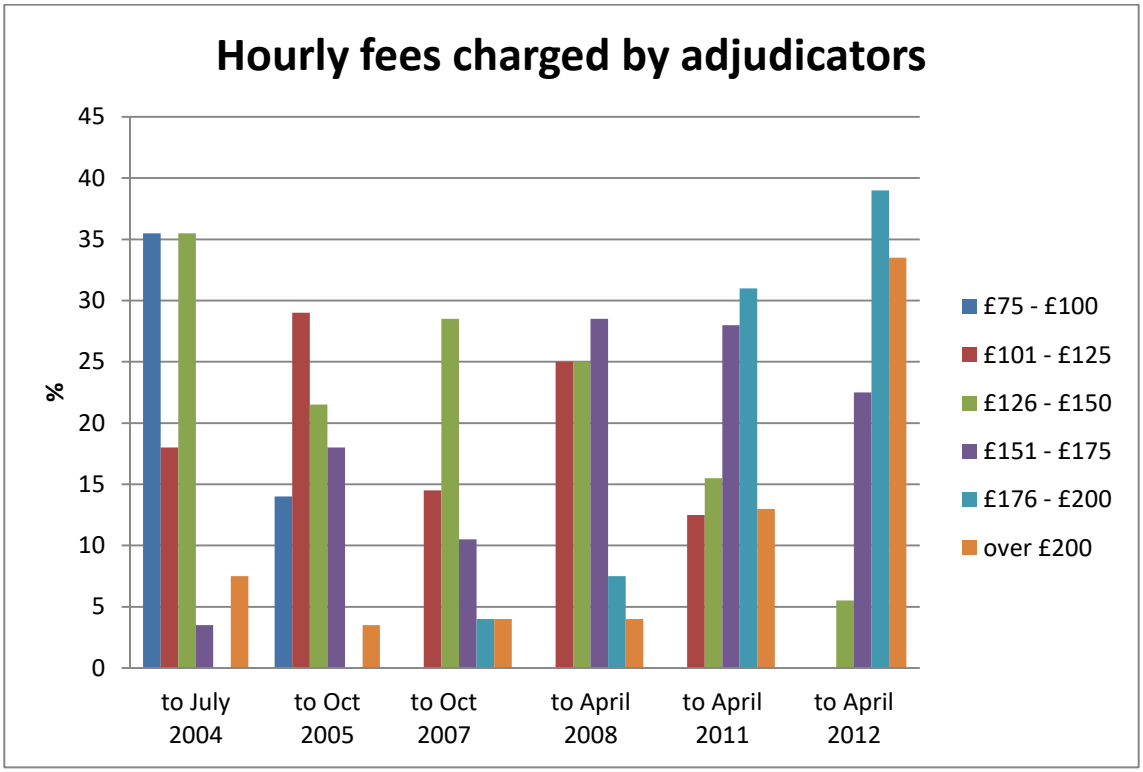

Figure 3.26 Hourly fees charged by adjudicators to April 2012

3.4.16 Summary

Whilst the research does not consider factors influencing decisions and/or the decision-making process it is useful as a guide to the popularity of adjudication, albeit that in the last couple of years they report a decline in the number of adjudications. Further, their research would seem to support the fact that further research will serve to benefit the industry and add to the available knowledge, and reasoning behind some of their reporting would make interesting reading and assist with understanding.

Interestingly Kennedy and Milligan identify that the referring party in an adjudication is more likely to be successful and this would appear to be a common trait based on statistics from a number of years. The findings appear reliable, as they remain consistent. In terms of predicting an outcome, it would appear that one is much more likely to be successful as a referring party as opposed to a responding party in a Statutory Adjudication. The reasoning for this is not fully explored by the authors and would benefit from further structured research. However, the fact that a referring party can

prepare fully and in their own good time before referring and the responding party has a very limited time in which to respond, would seem to suggest at least one reason as to why this is the case.

3.4.17 Other Research

Lynch (2002) produced some solid research work into Statutory Adjudication in pursuit of a higher degree. He considered to what extent the process of Statutory Adjudication might readdress the balance of power between main contractors and subcontractors. He cites and relies to some extent upon the work conducted at the Adjudication Reporting Centre. Whilst his work has nothing to do with predicting decisions it is well structured in its developments of Statutory Adjudication and shows that in general the users' perspective is positive. It also adds to the general level of understanding of Statutory Adjudication as it considers the commercial relationship that a main contractor and subcontractor has and how this might impact upon the statutory right to adjudicate at any time.

Another researcher pursuing a higher degree also produced some interesting work in relation to natural justice in adjudication (Lee, 2006). Whilst the work was focused upon adjudication in Malaysia, it was heavily supported and referenced to experiences in the UK under the Housing Grants, Construction and Regeneration Act 1996. Whilst this research is not specifically geared to influences/factors and decision-making in Statutory Adjudication it does raise some interesting thoughts in relation to natural justice and to the extent that this does and should feature in adjudication generally.

Ashcroft (2010) conducted further research in regard to the then proposed changes to the Housing Grants, Construction and Regeneration Act 1996 as they were then contemplated by introduction of The Local Democracy, Economic Development and Construction Act 2009. Such work was conducted in pursuit of an LLM in Construction Law and Practice. The work is well referenced and considers the then proposed changes in some detail. Whilst such work is useful and the changes are reflected in the Literature Review supporting this research, the work does not consider predictability of adjudicators' decisions or the factors that may influence such decisions.

This section of the Literature Review serves to meet objective 1 (d) to conduct a detailed Literature Review to establish the current level of knowledge in relation to previous research undertaken in regard to Statutory Adjudication.

3.4.18 What Gaps Appear to Exist in the Available Body of Knowledge?

The gaps in knowledge in understanding of Statutory Adjudication generally have been significantly reduced by extensive published work and pertinently the support or decisions of the courts. This has resulted in continued development of knowledge and understanding. Further revised legislation has sought to enhance the process, albeit that it remains to be seen as to whether this has been entirely successful.

However, it would appear that there are substantial gaps in other areas of the current knowledge, particularly in respect of the factors that might influence an adjudicator in his/her decision-making. It would further seem that predictability of such decisions has not been adequately or reliably explored previously. The most notable observation made is simply that one is more likely to succeed as the referring party in adjudication; this is however not supported by a fully developed and tested rationale.

Whilst there is research into the predicting of construction arbitration and construction litigation abroad it should be observed that such research reaches opposite conclusions as to predictability of outcomes of these two different processes. It is further very important to observe that Statutory Adjudication, whilst having some similarities to each alternative process, is in fact quite different as at least technically the adjudicator's decision is only temporarily binding, the process is short and certainly much shorter than arbitration or litigation, the process is generally much more economic and the rules applicable vary to that of the alternatives. Further, it should be remembered that both litigation and arbitration exist as methods of final dispute resolution following Statutory Adjudication, if a party so wishes to pursue the matter further.

3.4.19 Why Will This Research Add to the Current Level of Understanding?

This research has the potential to add significantly to the current level of understanding. It is foreseeable that if the research revealed that decisions in Statutory Adjudication could be reliably predicted then the construction industry as a whole could potentially save significant sums of money by not entering into a process that had a predictable outcome, particularly if a high degree of predictability happened to be revealed.

In any event, this research should add significantly to the current level of understanding as to what factors might influence an adjudicator in his/her decision-making process. In regard to adjudicators, this area of knowledge would appear to be without detailed previous research.

Further, it could be concluded that decisions in Statutory Adjudication are entirely unpredictable and that might possibly assist a party in deciding to offer a defence to a claim that one might ordinarily consider as having a predictable outcome. It may suggest to a party that has a weak claim that an unpredictable forum is potentially the best forum in which to bring such a claim. By contrast a party that felt it had a solid claim might conclude that Statutory Adjudication is unpredictable and therefore it would be preferable to refer the dispute to a final, more traditional, means of dispute resolution or seek to negotiate a settlement.

It would appear that both possibilities either predictability or unpredictability will serve to add to the available current level of knowledge as will, in any event, detailed consideration of factors that might influence an adjudicator in his/her decision-making process.

4 DEFINE STATUTORY ADJUDICATION

4.1 INTRODUCTION

Statutory Adjudication is the most widely deployed dispute resolution method for the construction industry domestically (Uff 2012), as such it would be expected that it would have an accepted definition, but a review of the literature reveals that there is not an accepted definition of Statutory Adjudication.

Riches and Dancaster (1999) identified the lack of, and a need for, a definition of Statutory Adjudication. As practicing adjudicators, they considered that the need for an accepted definition would add clarity and promote understanding of this important construction dispute resolution tool.

This chapter seeks to provide a definition of Statutory Adjudication. There is a gap in the available literature and body of knowledge as a widely accepted definition does not currently exist.

4.2 THE LACK OF DEFINITION OF STATUTORY ADJUDICATION

Statutory Adjudication has been created by virtue of the enabling legislation namely, the Housing Grants, Construction and Regeneration Act 1996 as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA 2009). Statutory Adjudication is not defined by that legislation or indeed by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended), which acts as a supporting scheme to the legislation, in the absence of an alternative agreed scheme or set of rules being implemented between the parties (Housing Grants, Construction and Regeneration Act 1996, Section 108 (5)). The scheme (as amended) identified above takes the form of a statutory instrument that is widely deployed within the construction industry. However, this scheme, in common with the enabling legislation does not define Statutory Adjudication.

A number of writers have identified the lack of a definition of Statutory Adjudication, including Elliott (1998), Stevenson (1999), Riches and Dancaster (2004) and Maiketso (2009) they noted that a widely accepted definition has not been determined. Redmond (2001) questions the rationale of this omission,

as a definition would add clarity, especially given more recent legislation (LDEDCA 2009), which changed aspects of Statutory Adjudication. It would appear difficult to suggest that there are not good grounds for adopting a widely accepted definition of Statutory Adjudication but Riches and Dancaster (2004) consider it must be comprehensive and clear.

4.3 ATTEMPTS TO DEFINE STATUTORY ADJUDICATION

Parliament did seek to define Statutory Adjudication in a proposed amendment to the Housing Grants, Construction and Regeneration Bill. The definition suggested was *'For this purpose 'adjudication' means a summary non-judicial dispute resolution process that leads to a decision by an independent person that is, unless otherwise agreed, binding upon the parties for the duration of the contract, but which may subsequently be reviewed by means of arbitration, litigation or agreement.'* This amendment was rejected and was therefore not included in the legislation.

Riches and Dancaster (2004) propose that to form a definition of Statutory Adjudication, a number of constituent parts would be required, namely, it should reflect the need for an adjudicator to:

> *'Act impartially,*
>
> *On the basis of such information as the parties to the dispute are able to provide him, or he is able to ascertain for himself,*
>
> *In a very limited time scale,*
>
> *Reach a conclusion as to the parties' rights and obligations under their contract on the basis of that information,*
>
> *Those conclusions being set out in a decision that is contractually binding on the parties until the original dispute is finally determined by legal proceedings or by an arbitration (if the contract so provides or the parties so agree) or by agreement between the parties'* (Riches and Dancaster, 2004:13).

Further, Riches and Dancaster (1999) attempted to compare Statutory Adjudication with Contractual Adjudication as a basis for establishing an agreed definition, but found that there were fundamental differences.

Despite these attempts to contribute to or set down a definition of Statutory Adjudication, a widely accepted definition has not previously been achieved.

4.4 REVISED LEGISLATION AND ITS IMPACT UPON A DEFINITION OF STATUTORY ADJUDICATION

A significant change was brought to Statutory Adjudication by introduction of part 8 of the Local Democracy Economic Development and Construction Act 2009 (LDEDCA 2009), which came into effect on 1st October 2011 in England and Wales. For the purposes of defining Statutory Adjudication, it is pertinent to observe that Section 107 of the Housing Grants, Construction and Regeneration Act 1996 was repealed. This section directed that Statutory Adjudication only applied to contracts in writing or evidenced in writing. The repealing of Section 107 allows for the Statutory Adjudication of verbal contracts or part verbal, part written contracts as well as contracts wholly contained in writing.

4.5 WORKING TOWARDS A CONSIDERED DEFINITION OF STATUTORY ADJUDICATION

In order to offer a considered definition of Statutory Adjudication it is necessary to identify and define the elements that collectively constitute it. These elements are considered below:

1. Statutory Adjudication is a mandatory provision, it creates a statutory right – It applies to the vast majority of construction contracts (but not all, refer Section 104 and 105 of the HGCRA 1996 and the Construction Contracts (England and Wales) Exclusion Order 1998). One party alone cannot seek to render unavailable this method of dispute resolution (Section 108 of the Housing Grants, Construction and Regeneration Act 1996). The statutory right to refer to adjudication can be applied by either party to the contract at any time (Section 108 of the HGCRA 1996, Hershel Engineering Limited v. Breen Property Limited [2000] EWHC (TCC) 178 and Connex South Eastern Ltd v. MJ Building Services Group Plc [2005] BLR 201). The right cannot be extinguished or restricted (Yuanda (UK) Co. Ltd v. WW Gear Construction [2010] EWHC 720 (TCC) and RG Carter v. Edmund Nuttall [2002] BLR 359).

2. The decision of the adjudicator provided it is valid, and despite it being temporary is enforceable and this position has been widely supported by the courts. Macob Civil Engineering v. Morrison Construction [1999] BLR 93 was

the first landmark example and accordingly set out below is the following from this important judgment:

> *'The intention of Parliament in enacting the Act* (The Housing Grants, Construction and Regeneration Act 1996) *was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced, pending the final determination of disputes by arbitration, litigation or agreement. The timetable for adjudication is very tight. Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to be aware of this...Parliament has not abolished arbitration or litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.'*

The rationale applied considers that whilst an adjudicator might make mistakes in the very short time scale applied to the process, the will of Parliament it is suggested considered the possibility of errors occurring and chose to deal with that by not excluding the parties from the option of pursuing litigation, arbitration or for them reaching a subsequent agreement. The matter was further highlighted in a judgment which stated that *'Adjudication is intended as a summary process. There is implicit within it a risk of injustice, but Parliament has considered that risk to be acceptable because an adjudication is of limited temporal effect and only of an interim nature.'* (Shepherd Construction Limited v. Mecright Limited [2000] BLR 489).Therefore an adjudicator's decision that is valid, whilst temporary, will be enforced by the courts. A subsequent Judgment reinforced the view and stated that *'The Court of Appeal has repeatedly emphasised that the adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law.*' (Carillion Construction Limited v. Devonport Royal Dockyard [2005] CILL 2253).

3. For an adjudicator's decision to be valid the adjudicator must have jurisdiction and the decision must have taken account, insofar as the process allows, of the rules of natural justice and must not have demonstrated any actual or apparent bias. It is important to note that even if the decision is evidently wrong as long as it is valid it will ordinarily be enforced (The principle set down in Bouygues (UK) ltd v. Dahl – Jensen (UK) Ltd [2000] BLR 522) and further followed for example in William Verry v. North West London Communal Mikvah [2004] EWHC 1300 (TCC). The Court stated that

it will not look into whether the decision of an adjudicator is right or wrong, it will simply determine whether the decision is valid or not.

In order to summarise Statutory Adjudication it should be observed that:

Statutory Adjudication is provided for by the Housing Grants, Construction and Regeneration Act 1996 (as amended by the LDEDCA 2009) and therefore:

- Parties to the vast majority of construction contracts have a right to refer a dispute to an adjudicator at any time;
- The adjudicator will make a decision that will be temporary and ordinarily enforceable;
- The decision will be rendered in a short time scale; and
- To be enforced the decision must be valid. The requirements for validity are broadly the application of natural justice insofar as that is possible, the satisfaction of the requirement of jurisdiction and the demonstration of no apparent or actual bias by the adjudicator.

Therefore, for the purpose of this research, Statutory Adjudication is defined as:

> ***A statutory dispute resolution process that is supported by legislation; that is particular to most construction contracts; that can be exercised as a non-extinguishable right at any time; that is paid for by the parties who ordinarily meet their own costs and that provides for a rapid and enforceable independent temporarily binding decision concluded without apparent or actual bias by an adjudicator, who has considered the facts and the law. The decision of the adjudicator will, providing it is rendered valid, be supported and enforced by the courts. The decision of the adjudicator remains binding, unless the parties jointly agree to settle the dispute on different terms or that the matter is heard afresh by a different final dispute resolution process such as litigation or arbitration.***

This section of the thesis serves to meet objective 2, to define Statutory Adjudication as a widely accepted definition does not currently exist.

5 THE PROCESS OF STATUTORY ADJUDICATION

This chapter explores the process of Statutory Adjudication. The aim of this chapter is to identify factors in the process that might affect decision-making and therefore the predictability of decisions made by adjudicators.

Statutory Adjudication follows a well-defined and structured process which is fundamental to its proper operation as a formal construction dispute resolution process. There is some flexibility in terms of what the adjudicator might direct or otherwise what the parties might agree. The process is regulated by legislation namely, the Housing Grants, Construction and Regeneration Act 1996 (As amended by the Local Democracy, Economic Development and Construction Act 2009) and The Scheme For Construction Contracts (England and Wales) Regulations 1998 (as amended) Statutory Instrument No. 649 (The Scheme). The Scheme is widely used.

The process of adjudication is diagrammatically set out in Figure 5.1 below:

THE PROCESS OF ADJUDICATION

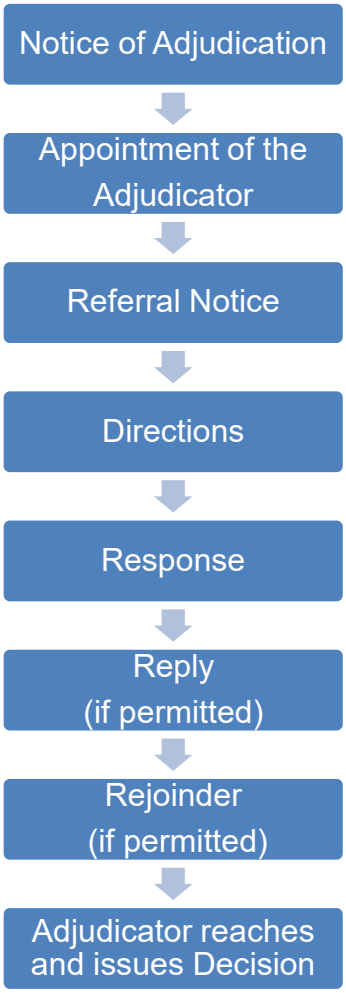

Figure 5.1 The process of adjudication

The objective of Statutory Adjudication is to deliver an enforceable decision in a short time frame, in order to settle a dispute under a qualifying construction contract on a binding but temporary basis.

5.1 NOTICE OF ADJUDICATION

The process of adjudication commences with the issuance of a Notice of Adjudication (sometimes referred to as a 'Notice of Intention to Refer to Adjudication'). This is an important document; it defines the dispute to be determined, its scope and limits; it runs to the centre of the adjudicator's jurisdiction to decide the dispute. The Notice cannot be varied once submitted; it is at the centre of what the dispute is and what the referring party is seeking. Coulson (2011:441) suggests that it is the most important document

in an adjudication because it defines the dispute that the adjudicator has to decide.

Lloyd J set out in the quite early days of Statutory Adjudication the purpose and function of a Notice of Adjudication in Griffin & Anor (t/a K&D Contractors) v. Midas Homes Ltd [2000] 78 Con LR in which he stated that:

> *'The purposes of such a notice are first, to inform the other party of what the dispute is: secondly, to inform those who may be responsible for making the appointment of an adjudicator, so that the correct adjudicator can be selected and finally, of course, to define the dispute of which the party is informed, to specify precisely the redress sought, and the party exercising the statutory right and the party against whom a decision may be made so that the adjudicator knows the ambit of his jurisdiction.'*

It can be seen from the above statement that selecting the correct adjudicator is driven, at least too some degree, by the Notice of Adjudication. This establishes the point that a carefully drafted Notice could lead to the selection of a particular adjudicator or one from a group of particular adjudicators. This then in turn might impact the predictability of decisions.

It is important that the requirements of the Notice of Adjudication are followed as it is the very foundations of the adjudicator's jurisdiction in the dispute and it sets out the scope and limit of the referring party's claim in the adjudication (Ken Griffin v. Midas Homes Ltd [2001] 78 Con LR 152). To further reinforce the importance of the Notice of Adjudication it was found in KNS Industrial Services Ltd v. Sindall Ltd [2001] 17 Const LJ 170 that the Notice of Adjudication defines the dispute referred and that the Referral Notice and/or subsequent submissions do not either cut down or expand the dispute as set out in the Notice of Adjudication (Rawley et al 2013). If the scope of the dispute is inadequately set out, a party is perhaps likely to find the decision less predictable as the dispute they have sought to refer to adjudication may not be properly reflected by the Notice. The party issuing the Notice limits the scope of the adjudication and will be bound by that Notice once the Referral is submitted. It is important that the Notice is well considered as otherwise the dispute referred may not be capable of resolution in the adjudication. A poorly drafted Notice might render any decision more difficult to predict.

The decision of Akenhead J in Wales and West Utilities Limited v. PPS Pipeline Systems GMBH [2014] EWHC 54 (TCC) reconfirmed the importance

of carefully drafting the Notice of Adjudication, otherwise the respondent may be able to exploit the imprecise nature of the Notice of Adjudication to introduce other areas of a dispute, beyond which the referring party intended to refer to adjudication. There is a distinct need for clarity in defining the dispute. If a dispute is poorly defined and the Notice is poorly drafted the introduction of other areas of a dispute are foreseeably likely to render a decision by an adjudicator less predictable. The importance of careful drafting cannot be overstated.

5.1.1 Notice of Adjudication – A Single Dispute

As a party to a construction contract is entitled to refer a dispute to adjudication, the Notice of Adjudication identifies and seeks to refer a single dispute. It may be that there are many facets to a particular dispute and these will be brought out in due course, notwithstanding for the purposes of the Notice of Adjudication it must be such that a dispute (singular) is referred and not disputes (Coulson, 2007).

The courts have been relatively flexible in this regard for example in Fastrack Contractors Ltd v. Morrison Construction Ltd & Anor [2000] BLR 168 the dispute was in regard to measured work, variations, prolongation costs, loss and expense and loss of profit resultant of repudiation. It was in effect Fastrack's claim for outstanding sums following termination of their contract. The Court agreed that this was the referral of one dispute to adjudication.

Coulson (2011) observed that in the Fastrack case above, an inclusive approach was adopted by the Court and this brought these aspects of a claim into a single dispute. The inclusive approach was followed in KNS Industrial Services (Birmingham) Ltd v. Sindall Ltd [2001] 75 Con LR 71 and Sindall Ltd v. Solland [2001] 3 TCLR 30.

One might suggest that the inclusive approach was adopted by the courts to support the process of Statutory Adjudication and whilst not exclusively this approach is often followed.

However, by their very nature inclusive matters are more complex and therefore if an inclusive approach is adopted, might that render the adjudicator's decision unpredictable? Some suggest that with a number of

issues contained in a dispute then it is difficult to see how errors could not be made.

By reference to adjudicators' decisions it is possible to observe whether the dispute is inclusive of many matters. As an observed factor it should then be possible to test whether a party referring a dispute including inclusive matters is more likely to be successful or not. In reality, this would be the comparison of simple and complex disputes for the purposes of this research. Complex matters are generally the consideration of various heads of claim, akin to the inclusive approach, as set out in Fastrack Contractors Ltd v. Morrison Construction Ltd & Anor [2000] BLR 168 above.

It is however prudent, to avoid any difficulty with the validity of the Notice of Adjudication, to ensure that only one dispute is referred to Statutory Adjudication. The process of Statutory Adjudication envisaged and was structured to resolve singular disputes in a timely fashion (Franklin, 2005).

5.1.2 How might this impact the predictability of adjudicator's decisions?

In practice adjudicators do complain about poorly drafted Notice(s) of Adjudication not least because the referring party has had an unrestricted amount of time to draft the document and therefore should be capable of ensuring it is correct. It has been suggested by participants in the process that a defective Notice of Adjudication impacts negatively on an adjudicator even if it is subsequently replaced with a valid Notice of Adjudication. Participants have also suggested that commencing on the wrong foot so to speak puts the adjudicator in a place whereby he/she might be more sympathetic towards the responding party. This however, appears to be speculation or at least is not supported by research. This research will consider whether a defective Notice of Adjudication has an impact upon the predictability of adjudicator's decisions.

It is possible to observe from most adjudicators' decisions whether there was complaint(s) about the validity of the Notice by a party and what the adjudicator did or did not do in response to such complaint(s). It is also sometimes possible to see if a Notice had to be reissued, which might suggest a lack of competence on behalf of the referring party or its representatives. Therefore, it is possible to include factors relating to the

Notice in to a model in order to determine whether this impacts predictability of an adjudicator's decision.

It is also possible to tell from the decision whether the dispute was inclusive or complex this can therefore also feature as a factor in a model in seeking to determine predictability.

5.1.3 Response to the Notice of Adjudication

Urgent attention needs to be given by the responding party to the Notice of Adjudication it is at this point that the responding party should consider as to whether there is a construction contract between the parties and whether any adjudication requirements set out in the contract have been followed such that an adjudicator will have jurisdiction when appointed. If the responding party believes that an adjudicator will not have jurisdiction then that point should be raised immediately. Otherwise such a right might be lost (Cowlin Construction v. CFW Architects [2003] EWCA Civ 1494 and CJP Builders Ltd v. William Verry Ltd [2008] EWHC 2025 (TCC)).

If none of the above apply to the responding party it is worthy of note that the Scheme does not require anything from the responding party at this stage.

A prudent responding party would however commence working on the Response to the Referral Notice. It is true to say that at this point, the responding party won't know exactly what is in the Referral Notice but they will have knowledge and understanding of the dispute from the Notice of Adjudication and previous correspondence or communication sufficient for preparation to commence, as time after receipt of the Referral Notice will be limited.

In reality it would be unwise for a party not to start work as soon as the Notice is received however, it is not generally possible to tell from decisions when the responding party started their work and therefore this is not a factor that can be tested from previous decisions to seek to establish predictability.

5.2 APPOINTMENT OF THE ADJUDICATOR

Following issuance of the Notice of Adjudication it is necessary to appoint an adjudicator to determine the dispute. Some construction contracts do include a named adjudicator, which in some instances is not helpful as the adjudicator

may be too busy to deal with the dispute (IDE Contracting Ltd v. RG Carter Cambridge Ltd [2004] BLR 172), he/she may be unwell, or on leave or as has been the case before the adjudicator had passed away (Amec Projects Ltd v. Whitefriars City Estates Ltd [2004] EWHC 393 (TCC)). Despite these foreseeable difficulties, the benefit is that both parties would, at pre contract or dispute stage have had the opportunity to input into the selection of an appropriate and known adjudicator. It is however still not common practice for a named adjudicator to be identified within the construction contract. Anecdotally industry professionals suggest that if an adjudicator is named in the contract he/she might feel grateful to both parties and therefore ensure that each party recovers something or that neither party recovers nothing. That might then lead to further naming in contracts by those parties or by one party contracting with another suggesting the same adjudicator. Such a theory has not as yet been formally tested. This research will seek to test this variable by reference to previously decided adjudicator decisions.

It is more likely and indeed commonplace for the construction contract to identify an Adjudicator Nominating Body (Kennedy and Milligan, 2010) such as the Royal Institution of Chartered Surveyors (RICS) or the Royal Institution of British Architects (RIBA) or The Chartered Institute of Building (CIOB) for example. In such instances, it is for the referring party to write to the identified Adjudicator Nominating Body enclosing a copy of the Notice of Adjudication and request that the Adjudicator Nominating Body appoint an adjudicator to determine the dispute. In the event that the construction contract does not identify an Adjudicator Nominating Body then a referring party may select any proper Adjudicator Nominating Body holding itself out to provide such nominations. The referring party will need to pay a fee to the nominating body for its nomination service. What effect the selection and appointment of the adjudicator has upon the predictability of the decisions will be considered as part of this research. Does having the right of selection of an Adjudicator Nominating Body tend to lead to success for a given party? As an example, does selecting the Chartered Institute of Building, with a Chartered Builder nominated tend to result in decisions that favour main contractors for example? The right to select a particular ANB will form part of this research by reference to previously decided decisions.

5.2.1 Selective Appointment of an Adjudicator

It could be the case that the referring party might request that the Adjudicator Nominating Body appoint a particular adjudicator or that they request that a particular adjudicator is not appointed. In the instance that this happens, the request must be copied to the responding party in order for them to raise any objection that they might have. Ultimately, it is for the Adjudicator Nominating Body to decide who is nominated, albeit they often do have regard for the wishes of the parties.

However, in one case a party tried to resist enforcement of an adjudicator's decision on the basis that a requested (by the other party) adjudicator had been appointed by the Adjudicator Nominating Body, the complaining party made no objection at the time of nomination and in consequence the decision of the adjudicator was enforced (Makers UK Ltd v. The Mayor and Burgesses of the London Borough of Camden [2008] BLR 470).

In contrast in Eurocom Ltd v. Siemens Plc [2014] EWHC 3710 (TCC) the Court refused enforcement of the adjudicator's decision on the basis that fraudulent misrepresentation had occurred during the nomination process with one party obtaining their preferred adjudicator by means of misrepresentation and therefore it was concluded that the adjudicator did not have jurisdiction to decide the dispute. The misrepresentation concerned limited the number of adjudicators to very few by virtue of discrete qualifications/experience and then allegedly only one adjudicator was actually available to decide the dispute in the time available.

One might suggest that if a particular adjudicator is appointed the reasoning might possibly be previous decisions in the favour of a party. It might be simply that he/she is considered the best adjudicator for the dispute by a party. However, one also might suggest that an adjudicator that is regularly requested and appointed might be grateful for such appointments. This research will consider as to whether predictability can be impacted by the request for a given adjudicator, by reference to the success or otherwise of the parties.

5.2.2 Challenging the Nominated Adjudicator

When a party believes that the adjudicator does not have jurisdiction to determine the dispute that party should write to the adjudicator (with a copy to the other party to the dispute) as soon as the party becomes aware of the contended lack of jurisdiction. The complaining party should set out precisely why they believe the adjudicator does not have jurisdiction and invite the adjudicator to resign accordingly. The adjudicator should respond promptly and will at that stage determine whether or not he/she considers he/she has jurisdiction or not. In the event that the adjudicator determines that he/she does have jurisdiction then the complaining party effectively has three options:

1. The complaining party can refuse to take its place in the adjudication;

2. The complaining party can partake in the adjudication but expressly reserve its right to challenge jurisdiction formally later; or

3. Regardless of the jurisdictional point, the complaining party can agree to be bound by the adjudicator's decision.

Refusing to take place in the adjudication is extremely risky and not recommended unless it is accompanied by an application to the Technology and Construction Court for a declaration that the adjudicator does not have jurisdiction (Coulson 2011:446) otherwise the adjudicator might reach an enforceable decision in the absence of submissions from the complaining party.

It is generally considered most appropriate for a complaining party to partake whilst expressly reserving its right to challenge jurisdiction at a later stage if appropriate.

It is usually possible to tell from an adjudicator's decision if a party has objected to the jurisdiction of an adjudicator. It is also then possible to see what action the objecting party took and what the adjudicator decided in relation to jurisdiction.

It might be the case that objections to jurisdiction or subsequent action by a party impact upon predictability. Is it likely that an objecting party will be

less or more successful? This research will seek to establish whether this factor impacts predictability.

5.2.3 How might this impact the predictability of adjudicator's decisions?

All of these factors in the appointment of the adjudicator may have an effect on the outcome and will be tested to determine whether they are a predictable factors and need to be included in the model. Participants in the process of Statutory Adjudication have suggested that an early jurisdictional challenge is difficult to balance. On the one hand, if the point is not raised then the right to object may be lost and yet on the other hand to commence with complaining about the right of the adjudicator to decide the dispute, might impact negatively on the complaining party's chances of succeeding with its case. However, such submissions have not been tested by structured research. One might suggest that an objection to jurisdiction might not put a party in the best place in the view of the adjudicator but does this affect the predictability of the decision? This research will explore as to whether an objection(s) to jurisdiction impact upon the predictability of the adjudicator's decision.

5.3 THE REFERRAL NOTICE

After the Notice of Adjudication and the letter/application form seeking the nomination of an adjudicator the referring party must issue the Referral Notice and this should be done within 7 days of the Notice of Adjudication.

The Referral Notice is very important to the referring party as it is their opportunity and very often their only proper opportunity, to set out the case upon which they rely. There is generally a further, but limited, opportunity for a Reply following the Response from the responding party but this is a far lesser opportunity for the referring party. An adjudicator may also seek to limit the amount of documentation and subject(s) of any Reply.

Having observed this important opportunity for the referring party, Coulson (2011) notes the large amount of correspondence generated in construction disputes and suggests that it is unwise to include anything other than directly relevant material with the Referral Notice because of the time constraints and the pressure on the adjudicator to reach his/her decision promptly.

It should however be recognised that in practical terms the referring party has had the opportunity to prepare the Notice of Adjudication and the Referral Notice at its own pace and therefore one might suggest that the documentation should be well prepared and as comprehensive as necessary.

One might speculate that if the Referral Notice is sufficiently poor and the adjudicator raises that in his/her decision then the decision predictability might be impacted, albeit that this has not yet been formally tested. Anecdotally and as Coulson (2011) observes including irrelevant information is unwise and further is likely to be a distraction to the decision-making process and will likely impact upon the predictability of decisions. This however again has not been formally tested. In most instances, it is possible to tell from the decision the extent of information included and note any observation(s) by the adjudicator. Particularly one is often able to see if the adjudicator is critical of submissions. This will contribute to a model in order to test the predictability of adjudicators' decisions.

5.3.1 How might this impact the predictability of adjudicators' decisions?

In practice, adjudicators do complain about poorly drafted Referral Notices (Entwistle, 2012) not least because the referring party has had an unrestricted amount of time to draft the document and therefore should be capable of ensuring it is correct, concise and reflective of the dispute set out in the Notice of Adjudication. It has been suggested by participants in the process that a defective Referral Notice impacts negatively on an adjudicator as it appears to suggest that a party is not clear about what its case actually is and this leads him or her to be more likely to be sympathetic towards the responding party. This however, appears to be speculation or at least it is not supported by structured research. This research will consider whether the Referral Notice was defective, by reference to a decision previously made. This will enable assessment as to whether there appears to be any impact upon predictability of adjudicators' decisions when the Referral Notice is properly and concisely constructed and served, contrasted with when it is not.

5.3.2 A Selective Approach to Nomination of an Adjudicator

Some mischief has however become apparent in the adjudication process in regard to the issuing of the Referral Notice to the adjudicator. In Lanes Group PLC v. Galliford Try Infrastructure Limited [2011] EWHC 1035

(TCC). Akenhead J identified what he considered to be a gap in the legislation. Galliford Try asked the Institution of Civil Engineers (ICE) to nominate an adjudicator who had acted in an earlier dispute under the Contract. Lanes objected to that and the ICE appointed another, whom Galliford Try objected to. The approach of Galliford Try was simply not to send the Referral Notice. The adjudicator would not then have jurisdiction within 7 days of the Notice of Adjudication and thus Galliford Try would resubmit the Notice of Adjudication and nomination request, and obtain another different nomination. It was foreseen that Galliford Try could keep doing this until they obtained an adjudicator nomination that they did like. In other words a party could potentially select an adjudicator unilaterally.

Akenhead J found that not serving the Referral Notice was a breach of contract (being a breach of the adjudication agreement), which may give rise to an entitlement to damages. However, any damages in such circumstances are likely to be minimal, which suggests that there isn't a real deterrent to the referring party being selective in who decides the dispute that they have referred.

The selective approach to nomination of an adjudicator came before the court in 2014 in Eurocom Ltd v. Siemens PLC [2014] EWHC 3710 (TCC) in what some regarded as a significant detraction from Statutory Adjudication. In this case it was found that the Claimant's representatives had fraudulently misrepresented to the nominating body the fact that a lengthy list of potential adjudicators could not be appointed, because there would be a conflict of interest. This was found to be incorrect, as the adjudicators listed had no conflict with the Claimant (albeit the adjudicators listed did have conflict with the Claimant's representatives) and it was suggested that it was purely an attempt to have nominated a particular adjudicator.

A similar misrepresentation was alleged in CSK Electrical Contractors Ltd v. Kingwood Electrical Services Ltd [2015] EWHC 667 (TCC). However in this case it was decided that whilst the nomination request included a sentence that read *'...It is preferred that any of the adjudicators in the attached list are not appointed.*' the evidence demonstrated that the sentence was a clerical error as no list was attached.

5.3.3 How might this impact the predictability of adjudicator's decisions?

This would appear to suggest that parties could seek to be selective in the likely nomination of an adjudicator and perhaps select an adjudicator who had decided in their favour before or decided in a particular way in similar circumstances to the referred dispute. It might be possible to establish whether selection has occurred from a decision and that being the case it would be a factor that a model could test in seeking to establish predictability.

5.4 DIRECTIONS

Once the Referral Notice has been served and considered by the adjudicator, it is usual for the adjudicator to issue Directions, which shall direct how the dispute is to be managed through to the issuance of the adjudicator's decision. The first Direction normally requires the responding party to submit a detailed Response to the Referral Notice in a short time frame. The adjudicator will then normally decide as to whether or not a hearing should be held, which is in reality rare, but might be appropriate in complex disputes, albeit the time available within the process will ordinarily limit the duration of any such hearing in any event. The adjudicator will direct matters to facilitate the process; examples include the need for expert assistance or the necessity or not of a site visit etc. The adjudicator will also normally determine and set the entire timetable for the adjudication.

It can be seen that the adjudicator has significant discretion in directing the conducting of the adjudication and may also proceed in the event that a party fails to comply with Direction(s).

5.4.1 How might this impact the predictability of adjudicator's decisions?

It is possible that an adjudicator's decision will describe when Directions have not been complied with. Some within the industry suggest anecdotally that adjudicators might be minded to decide against a party that fails to comply with or belatedly complies with Directions. This research will seek to test that suggestion by observing as to whether a party that is late or fails to comply with Directions is more likely to be successful or not. This will in turn serve to assist in determining predictability of the adjudicator's decision.

5.5 RESPONSE TO THE REFERRAL NOTICE

The Response to the Referral Notice is very important to the responding party as it is their opportunity and very often their only proper opportunity to set out the case upon which they rely as a Defence and Counterclaim as may be appropriate. Coulson suggests that the best responses set out the Referral and the Response side by side so that the adjudicator may immediately understand each parties' case in the shortest possible time (Coulson 2011:450). However, Coulson's suggestion is not often followed in practice. The responding party would want the adjudicator to understand their case as soon as possible and should provide a concise and cross-referenced Response. However, Entwistle (2012) identifies that Responses can be poorly drafted. The responding party should appreciate the fact that the quality of their submission will likely impact the adjudicator's decision. The quality of the Response can often be deduced from the adjudicator's decision by reference to the adjudicator's comments or reasons. A poor quality Response is likely to impact upon the success or otherwise of the responding party and therefore is a factor that will be included in a model to determine predictability.

There is no timescale provision stated in the Scheme for the Response. All the adjudicator must do is determine the dispute within 28 days, other than if extended by the referring party by up to 14 days or to such other time that the parties might agree. The adjudicator still naturally needs time to consider and decide the dispute. Simmonds (2003) notes that the time for a Response is limited and that it should not be less than 7 days, but is unlikely to exceed 14 days. Typically Simmonds understands that adjudicators allow 14 days for the serving of a Response, but this timescale is set by the adjudicator in his/her first Direction and might well depend on the adjudicator's perception of the complexity of the matter referred to him/her. However, in practice it can be that the period allowed for a Response is often only 7 days.

It needs to be observed that the more time the adjudicator allows for the Response the less time he/she will have to reach his/her decision; of course, the same can be said of submissions post the Response.

Responding parties often complain that they cannot provide an adequate Response in 7 days and seek to extend time, which is sometimes agreed by adjudicators. There are important potential factors to consider here:

1. If a responding party has to issue a Response within 7 days how often are they successful or not?
2. If the responding party has up to 14 days are they more successful or not?
3. If the parties agree a further extension of time, which party tends to benefit the most?
4. If the adjudicator is given less time to decide which party benefits most?

All of the above are potential factors that this research will consider in seeking to determine predictability.

5.5.1 How might this impact the predictability of adjudicator's decisions?

In practice adjudicators do complain about poorly drafted Response documents (Entwistle, 2012) albeit they would appear to be less critical as they might appreciate that the responding party has likely had much less time to prepare than the referring party. However, at party representative level it is mooted that the time for the Response is critical and that the responding party has a better chance of success if they are allowed more time to respond. This would appear logical however to date it has not been tested. This research will seek to explore whether the predictability of adjudicator's decisions are affected by the time allowed for the Response and the perceived quality of that Response by reference to the adjudicator's decision.

5.6 REFERRING PARTY'S REPLY

There is no automatic right to a Reply to the Response by the referring party however, a limited Reply is often provided within a short time frame and this can be of assistance to the adjudicator, particularly when the responding party raises a new point in the Response, which the Referral does not identify and deal with. Others suggest that the referring party has had unlimited time to prepare their Referral and that a Reply should not be necessary or simply just serves to distract the adjudicator from his/her decision-making. Entwistle (2012) notes that some Reply documents just simply restate that which is

contained in the Referral. Parties should have their case heard and some suggest that a Reply adds significant value. Some within industry suggest that the Reply adds little or no value and is simply the display of a need to have the last or latest submission. Psychologists argue that there is benefit in having both the first and/or last word. This research will consider whether a party furnishing a Reply is more likely to be successful or not. This will then be taken into account when seeking to determine predictability.

Further, it is not unusual for parties to make submissions beyond a Reply, often for no other reason than to reinforce their main points of contention and why they think they are entitled to, or not if you're the responding party, the relief sought. This research will explore whether further submissions beyond the Reply impact predictability of a decision.

5.7 REJOINDER

Again, there is no automatic right to a Rejoinder or further submission in response to a Reply by the referring party. There is an obvious difficulty with the adjudicator reaching his/her decision within the timescale and allowing further submissions in responses to points made by the parties in pursuit of a just decision.

Further submissions beyond the referring party's Reply can, and often do, cause the adjudicator problems when such submissions arrive close to the time for the adjudicator having to make his/her decision. The adjudicator is left with the difficult situation of whether to look at the submissions and consider whether a response is required from the other side and allow such a response, or get on with reaching his/her decision and ignore the later submission. It is particularly difficult if the adjudicator is presented with new information that may not have been rehearsed between the parties in their arguments and would require the adjudicator to give the other side a chance of considering the matter and respond.

5.7.1 How might this impact the predictability of adjudicators' decisions?

In practice there are two schools of thought adopted by participants in Statutory Adjudication. One suggests that the provision of further submissions reinforces the strength of one's case and is likely to assist in persuading the

adjudicator. The other school of thought is that the dispute should be dealt with on the basis of the Referral and Response and that further submissions beyond that only frustrate the adjudicator who is bound to consider them whilst attempting to reach his/her decision in time (Entwistle, 2012). This research will consider the impact of the Rejoinder/further submissions on the predictability of the adjudicator's decision.

5.8 THE ADJUDICATOR'S DECISION

The adjudicator's decision must be reached, and within 28 days, following service of the Referral Notice or in accord with the time scale agreed with the referring party who may allow a further 14 days i.e. 42 days in total, or in accord with anytime period jointly agreed between the parties (para 19 of the Scheme). However, it is reported that most disputes are decided within the statutory 28 day time period (Kennedy and Milligan 2010).

5.8.1 How might this impact the predictability of an adjudicator's decisions?

Perhaps the most important point in relation to the decisions of an adjudicator and its predictability is time (Entwistle, 2012). Participants argue that a referring party should seek a decision within 28 days as to allow more time gives the opposing party a better opportunity to defend and/or prove their case. This research will consider as to whether allowing the prescribed or more time affects the predictability of an adjudicator's decision.

5.8.2 Summary

The process of adjudication is well defined and functions effectively. It is generally supported by the courts when the need arises. The process has not been subjected to significant change and adjudicators have generally sought to apply and maintain the process in the resolution of construction disputes by Statutory Adjudication.

There appears to be a number of factors that might influence the adjudicator's decision and affect the predictability of the decision that are particular to the process and these will be tested by reference to a model and previously made decisions.

This section of the thesis serves to meet objective 3, to define the process of Statutory Adjudication, analyse the same and then seek to identify the factors from the process that might impact adjudicators' decisions.

6 SURVEY ADJUDICATORS ON DECISION-MAKING AND REPORT FINDINGS

6.1 THE RATIONALE OF THE RESEARCH QUESTIONNAIRE

The following is the rationale that summarises what the research questionnaire was seeking to establish when sent to practicing adjudicators, by reference to the question number utilised within the questionnaire itself (Refer Appendix 1).

6.2 PART 1 – CONTEXTUAL INFORMATION

Question 1. Seeks to identify the age and gender of the subject in order to place the sample into context.

Question 2. Seeks to establish the primary profession so that it is possible to establish the career backgrounds of the sample.

Question 3. Seeks to establish the level of experience in the primary profession that the sample possesses.

Questions 4 - 5. Seek to establish the employment background and level of the subjects. The questions establish options as to those most likely to be involved in an adjudication.

Question 6. Seeks to establish the highest level of academic qualification of the subject.

Question 7. Seeks to establish the level of professional qualifications of the subject.

Question 8. Seeks to establish the level of training as an adjudicator and the provider(s).

Question 9. Seeks to establish the range of the number of adjudications undertaken by the subject.

Question 10. Seeks to establish as to whether the subject is also an arbitrator, not least as anecdotally some commentators suggest that arbitrators are more deliberative in their decision-making and that follows through into their work as an adjudicator.

6.3 PART 2 - ATTITUDES

Question 11. Some practitioners argue that the legislation does not properly provide for adjudication and this contributes to decisions being unpredictable. Therefore, the question seeks adjudicators' views as to whether current legislation provides for effective adjudication or not. If adjudicators think that it does or mostly does provide for effective adjudication, it is unlikely to be a significant factor with regards to predictability. If they think that it never or occasionally provides for effective adjudication it is possible that it contributes to the unpredictable nature of adjudication. The legislation drives parts of the process of adjudication; therefore, such responses would likely contribute to the outline of an Explanatory Model in due course.

Question 12. Many industry professionals and even the judiciary argue that complex disputes are not suitable for adjudication; the outcome is unpredictable as the disputes are too complex to determine in a short time frame. However, some adjudicators argue that any dispute can be determined in 28 days or 42 days with the referring party's consent. Some argue that serial simple adjudications are better and more predictable as the parties argue one point (at a time in a new adjudication) and the adjudicator decides. The research questionnaire sought to ask adjudicators to determine whether disputes can be too complex for adjudication. If replies were 'mostly' or 'always' then it is likely to contribute to the unpredictable nature of decisions. By contrast, if replies were 'never' it might be that adjudicators can effectively decide such disputes. It was possible that the replies to the research questionnaire might assist in validating the inclusion of complex disputes into an Explanatory Model.

Question 13. Adjudication is deployed to settle professional negligence claims. Commentators against such deployment argue that such disputes by their very nature are too complex for a short summary process such as adjudication and the decisions are unpredictable, given the complex nature of professional negligence claims. Some also argue that the decisions are unpredictable as it can be the case that one is asking a surveyor (as adjudicator) to decide that a fellow professional surveyor was negligent; some consider that this might not be done objectively. Whilst professional negligence disputes are referred to adjudication these are much less frequent than typical construction disputes.

The research questionnaire was seeking to establish the views of adjudicators and depending on the consistency of replies, establish the validity of the question for inclusion into an Explanatory Model.

Question 14. Some commentators argue that adjudication is only suitable for simple disputes (as the enabling legislation intended) and such decisions are at least more predictable. Others argue (including some adjudicators) that any dispute can be determined in 28 or 42 days providing the parties properly present their cases, fully argued and supported, to the adjudicator. That being the case some suggest that simple or complex is irrelevant. If the sample of adjudicators agree that simple disputes are better suited than complex disputes to adjudication, then it might be possible to establish whether complex or simple disputes are more or less predictable by including such factors into an Explanatory, then Predictive Model.

Question 15. Some practitioners argue that the fact that a responding party cannot extend time by 14 days, as a referring party can, is unjust and limits the responding party's opportunity to receive a just decision. Others suggest that as the dispute has already crystallised the responding party should be in a position to respond in time. With an equal opportunity to extend time, some suggest that the responding party would be able to properly set out their Response and the Decision would be more predictable, by reference to a structured Response document. The research questionnaire was seeking to establish the views of practising adjudicators and to establish whether this was likely to be a factor that should be included in the models to follow.

Questions 16 - 17. These follow the theme from question 15 above; the view expressed by some commentators is that if a responding party has more time then they furnish better documents, the result being that perhaps they are more likely to be successful or resist more of the claim against them. It would appear likely that time would be an important factor to include in a model. The replies to the research questionnaire would likely establish validity and perhaps contribute to the weighting to be applied to such factors.

Question 18. Adjudicators have been known to state that the time left for them to decide is insufficient and that accounts for some of the unpredictable nature of adjudication. Some adjudicators have said that they end up with hours, rather than days, to decide after the last submission is received. The

research questionnaire was to ask the decision makers whether the process would benefit from more time as foreseeably that might make decisions more predictable.

Question 19. Adjudicators have been known to complain about the submissions that they receive from the parties and that insufficient resources are allocated to the process by the parties. This possibly renders decisions unpredictable due to the incomplete or poorly argued/supported claims and responses. This question seeks to establish the views of a sample of adjudicators. Responses would likely establish the validity of this factor and contribute to establishing a reliable weighting for inclusion in a model in due course.

Question 20. Some practitioners and adjudicators argue that 28 days is long enough to decide any dispute providing that the parties properly present their cases, fully argued and supported, to the adjudicator. Others have said that the timeframe is too short and that that will contribute to unpredictable decisions. The research questionnaire was to ask the sample of adjudicators what their views were; time was likely to be an important factor that could then feature in a model.

Question 21. Some argue that less care is needed in deciding temporarily rather than finally. This might account for some of the unpredictable nature of adjudication. The fact that the parties can refer a dispute, post adjudication, to litigation or possibly arbitration for a final decision is perhaps justification for less care being necessary in adjudication, albeit some adjudicators argue that they do not agree that less care is appropriate and that, as an example, they dedicate the same care as needed for a temporary decision as they would for a final decision. The research questionnaire was seeking to obtain the views of a sample of adjudicators. At first blush, it appeared likely that it would be difficult to include such a factor into a model. However, in the first instance it would be necessary to establish its validity as a factor by seeking views from decision makers.

Question 22. Previous research (The Adjudication Reporting Centre) suggests that the referring party is more likely to be successful. Some argue it does not matter whether you refer or respond. This question was seeking to obtain the views of adjudicators as this could feature in the model in due course. It

might be the case that if a party refers, one might predict (as one factor among others) that they are more or less likely to be successful. The research questionnaire was seeking to establish the validity of the factor and the views expressed might contribute to the appropriate weighting that should be applied to that factor.

Question 23. Some practitioners argue that the Referral is informative, better quality and places the adjudicator in a position whereby they are likely to rely upon it as an informative, first served document. Others say that you need to have all the documents and that a Reply may be more informative. Some suggest it is better to be last in submitting as that will be the most recent document in the adjudicator's mind. The research questionnaire was seeking to validate the factor and contrast the level of response as that might contribute to the appropriate weighting to be applied.

Question 24. Some commentators suggest that as the Referral is detailed, the Response is a better quality document. Others suggest that the Response is generally of lesser quality and this contributes to the unpredictable nature of adjudication. The research questionnaire was seeking to establish what the sample, as adjudicators, generally thought of the quality of the Response, as this may impact what one might be able to predict. It can generally be established from decisions of adjudicators as to whether they complain about the Response. The extent to which they do complain appeared to be a factor that could be significant and could be measured rendering it suitable for inclusion into a model in due course.

Question 25. There is a debate as to whether adjudication should be limited to one submission from either side (a Referral and a Response). Some adjudicators say that there is often a Reply and Rejoinder or more submitted. Some say that the submissions are almost endless and unnecessary, adding little to the adjudication. It also limits the time that an adjudicator has to decide and that could contribute to the unpredictable nature of decisions. The research questionnaire was seeking to establish the views of practising adjudicators, as it was apparent that as a factor(s) it would be possible to test what impact further submissions might have on decisions by application of a model.

Question 26. For adjudication to be available to a dispute, the dispute must have crystallised (in basic terms the parties know that they are in dispute and know the basis upon which they are arguing). Some commentators argue that that being the case the parties should be able to make one substantive submission each (after the Notice). This would then allow the adjudicator to decide based on a submission from each, with more time to consider and reach a decision. Some suggest that a single submission from each would render a decision more predictable. The research questionnaire seeks to discover what adjudicators think about one submission from each party with, impliedly, no further submissions being required. This would likely link to a model insofar as if further submission are made by the parties, do such further submissions impact upon predictability?

Questions 27 - 30. These are all linked to the quality of submissions by the parties; some commentators say that submissions in adjudication are of insufficient quality and this renders decisions unpredictable. The research questionnaire seeks to establish to what extent adjudicators might or might not agree. From a decision it is generally possible to see comments or observations of the adjudicator on the quality of submissions. The research questionnaire would assist in validating what appears to be a valuable factor and possibly contribute to the weighting that ought to be applied to such a factor.

Questions 31 - 33. These are concerned with the quality of the decision maker; do ANB's monitor quality? Do adjudicators need more training? And have things improved? Commentators suggest that the quality of adjudicators appears to need improvement; some say that ANB's should do more, albeit it has improved from a low starting point, years ago. Some commentators suggest this is what makes decisions unpredictable. The research questionnaire was seeking to establish to what extent the sample of adjudicators might agree or disagree with commentators. It then might identify measurable factor(s) that could be included within a model. Correlation of responses might also contribute to the appropriate level of weighting that ought to be applied to such a factor(s).

Question 34. Some commentators suggest that a party is likely to be more successful if they are represented by a third party. Some say it makes little

or no difference. The research questionnaire seeks to establish what the decision makers think. What, for example, might be the consequence upon predictability should a party chose to represent themselves? This could be a factor in seeking to establish predictability of decisions.

Question 35. Some practitioners suggest that an adjudicator includes more detail in his/her decision if there are third party representatives engaged, particularly if the representatives are well-known in the industry, the logic being that if lawyers are involved, then perhaps the adjudicator wants to detail/support his/her decision more. This being the case some suggest that the decision is more deliberative and perhaps more readily predictable. The research questionnaire was seeking to establish the views of adjudicators in regard to detail in the decision if the parties are represented; the responses might suggest a level of weighting that ought to be applied to a model in due course.

Question 36. Some commentators (unsurprisingly lawyers) argue that lawyers are important to the success of an adjudication. So perhaps if a party is represented by lawyers, a party might be able to predict that they would be more successful. The research questionnaire was seeking to establish whether the sample of adjudicators share the view of lawyers or not, as that might impact predictability and might be a factor for inclusion in a model.

Question 37. Other commentators argue that lawyers detract from adjudication as they raise a large number of objections, which can be unfounded. That further limits the available time for decision-making by the adjudicator and this in turn makes the decision-making more of a rush and therefore the decision is arguably more difficult to predict. The research questionnaire was seeking to establish the views of a sample of adjudicators as to the objections raised by lawyers. This might be a factor that could be applied to a model; the research questionnaire responses might also contribute to the weighting that ought to be applied to such a factor should it be included into such a model.

Questions 38 - 39. Some commentators suggest that the endless objections to jurisdiction significantly hamper the process of adjudication and are a distraction from the adjudicator making his/her decision. Some suggest that such objections can be a cloak to conceal a weak case. It is possible to

establish from previous decisions if there have been objections to jurisdiction and therefore the research questionnaire was seeking to establish what the view of a sample of adjudicators was. It would appear possible that objections to jurisdiction might be viewed negatively. This foreseeably could be applied as a factor in seeking to predict a decision. The correlation of the responses might also contribute to any weighting that ought to be applied.

Questions 40 - 41. These questions concern complaints against adjudicators. Some argue that they are often unfounded and influence decision-making insomuch that the adjudicator might be minded to decide against the complaining party. Others suggest that such complaints distract from decision-making and this might contribute to the unpredictable nature of adjudication. For the purposes of a model, this may be a factor that can assist in seeking to calculate predictability. The research questionnaire was seeking to establish the views of a sample of adjudicators in this regard.

Question 42. Directions are set by the adjudicators, essentially what a party will do and by when. Some commentators suggest that if a party fails to comply with the Directions of an adjudicator they are more likely to be unsuccessful. One can normally see from the decision as to whether or not a party has complied with Directions and in consequence this could be a factor for inclusion in a model. The research questionnaire was seeking to establish the views of a sample of adjudicators, to establish validity of the factor and potentially contribute to the selection of any weighting that ought to be applied.

Question 43. Some commentators take the view that a party with an expert report is much more likely to be successful in adjudication. Some suggest that adjudicators often rely on such reports and that they aid decisions. No one appears to have asked adjudicators directly. The provision of an expert report in an adjudication may well be a measurable factor in seeking to establish predictability. The questionnaire was seeking to establish the views of a sample of adjudicators, the validity of the factor and potentially contribute to the selection of weighting that ought to be applied.

Question 44. Some commentators have previously said that if a party includes more cases in support of their position it is more likely to persuade an adjudicator, or perhaps the adjudicator might be put under pressure to accept

that position by reference to several legal cases. Some commentators suggest that such a suggestion is nonsense as cases often support both sides' cases. The research questionnaire was seeking to establish the views of a sample of adjudicators in this regard. As the decisions often set out the extent of the law/cases upon which a party relies, this might be a factor that should be included in a model in due course.

Question 45. Some commentators suggest that a party experienced in adjudication (some refer to them as a serial party) are much more likely to be successful. By reference to the business and/or by reference to enforcement cases one can often see if a party is experienced or not. The research questionnaire was seeking to establish the views of a sample of adjudicators, to test the validity of such a factor for inclusion, if appropriate, within a model in due course.

Question 46. When a party applies to an Adjudicator Nominating Body (ANB), the ANB has a very short period to nominate an adjudicator. Some commentators say that as a result, perhaps the ideal adjudicator is not appointed. Some further suggest that an adjudicator that always or often accepts a nomination will end up with more and more as it's the path of least resistance for an ANB so to speak. Some adjudicators suggest that ANBs do not share the work fairly. The research questionnaire was seeking to establish the views of a sample of adjudicators, to attest the validity of such a factor for inclusion, if appropriate, within a model in due course.

Question 47. A number of commentators suggest that adjudicators can render themselves too busy, overloaded with work and therefore unable to dedicate the amount of time that a decision properly requires and this in turn makes decisions very difficult to predict. Some adjudicators however argue that they could do with more disputes to decide, not less. The research questionnaire was seeking to establish the views of a sample of adjudicators. Albeit, it is not entirely clear if this is a feature testable by a model; this may contribute to the level of predictability.

Question 48. There is a current debate as to whether or not adjudicators' decisions should be published, just like court decisions. Some argue that if that was the case then it would be beneficial in terms of predictability, as a party could see how similar issues had been decided. Others suggest that as

adjudication is a private process then that should not therefore happen. Others suggest that it might raise standards in adjudication. The research questionnaire was seeking to establish the views of a sample of adjudicators in this regard, as it may contribute to why some suggest that adjudicators' decisions are unpredictable, there being little in the way of a standard to measure decisions against.

Question 49. This seeks the view of the sample of adjudicators as to who benefits most from adjudication. One might consider that if the answer to Question 4 is 'main contractor' does the same adjudicator consider that they benefit most and do they, by reference to decisions of those that have worked for main contractors, tend to decide in favour of main contractors or not? The research questionnaire was seeking to establish the views of a sample of adjudicators in this regard and to establish whether it might be a factor that could be measured within a model in due course.

Question 50. This was seeking views from the sample of adjudicators as to why decisions might be unpredictable, to establish possible reasons for unpredictability if decisions cannot be reliably predicted. This was intended to expand the scope of any research or model as necessary, should additional factors be stated on a repetitive basis for example. It was also intended to validate any reasons set forth in questions and contribute to the debate of any weighting that ought to be applied to factors within a model.

6.3.1 To summarise the subject area of the questions

Questions 1 – 10, 31 – 33 and 47 are concerned with the person, the decision maker.

Questions 11, 15 16, 17, 18, 20, 21, 25, 26, 38, 43, 46 and 48 are concerned with the legislation/process.

Questions 12 – 14 are concerned with the dispute.

Questions 22, 27, 28, 29, 30, 39, 40, 41, 42, 44, 45, 49 are concerned with the parties and the quality of their submissions/position/conduct.

Questions 34 – 37 are concerned with the impact of third parties.

Therefore, factors that might impact predictability are:

(a) The process of Statutory Adjudication;

(b) The person – the decision maker;

(c) The dispute; and

(d) The parties or their representatives.

6.3.2 The Findings

The responses to the research questionnaire were collated and recorded. The findings are set out below as an illustration of the questionnaire response distribution.

6.4 ILLUSTRATION OF QUESTIONNAIRE RESPONSE DISTRIBUTION

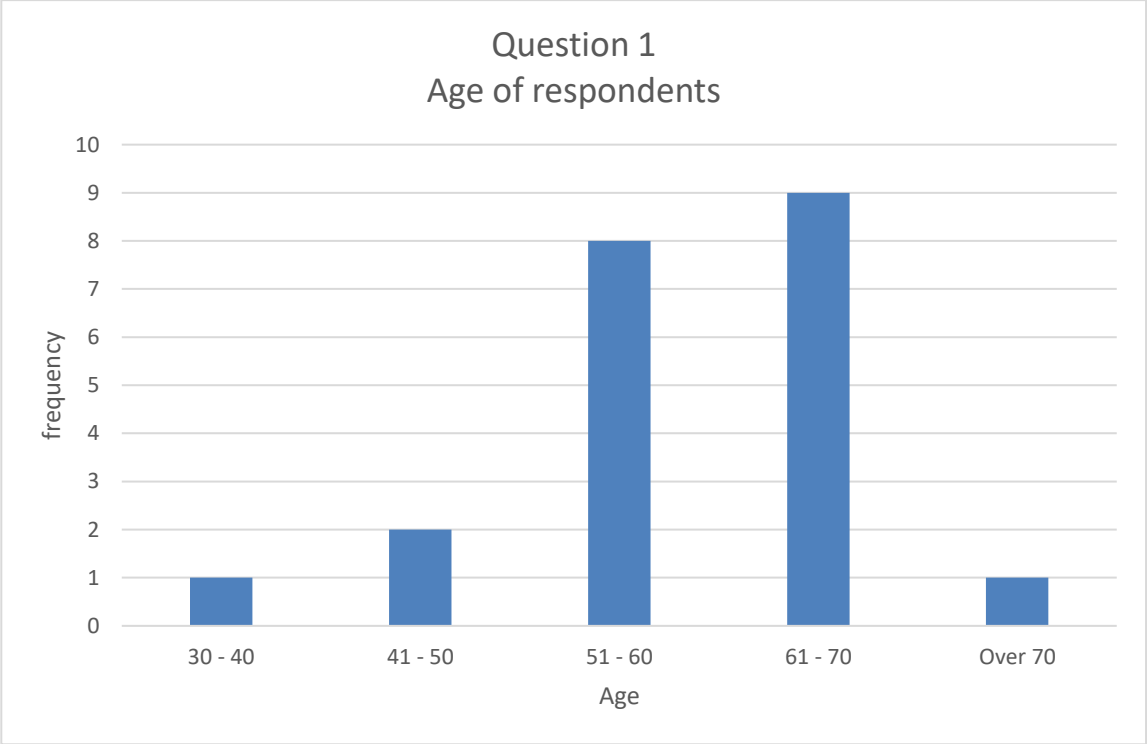

Figure 6.1 Age of respondents

6.4.1 Findings

With a mean age of 59 years and 6 months, it is such that the sample generally consists of experienced industry professionals in the latter part of their career, likely suitably experienced in order to resolve disputes as one might expect.

Whilst questionnaires were sent to a number of female adjudicators, completed versions were only received from male participants. The reasoning for that is unclear but as male adjudicators are by far the most significant proportion of

adjudicators, whilst it is unfortunate that there has not been female input, it is not considered of fundamental consequence to this part of the research.

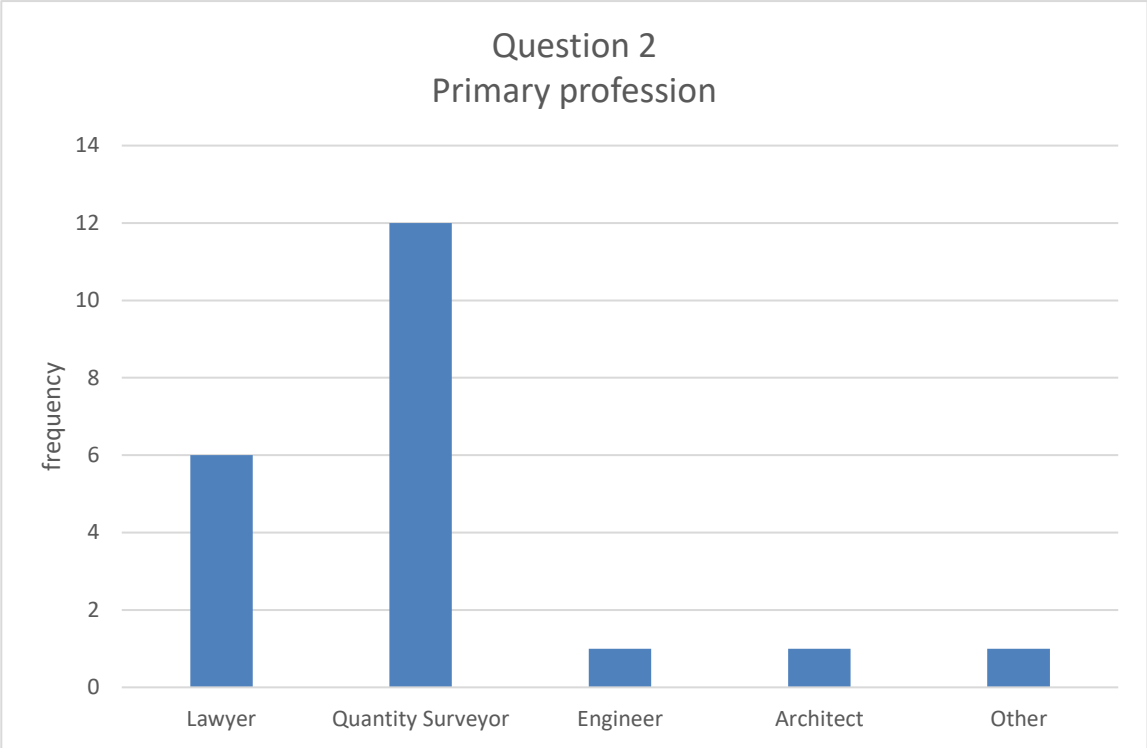

Figure 6.2 Primary profession

6.4.2 Findings

The responses from the sample to this question are largely as experienced in the industry. The vast majority of adjudicators are either quantity surveyors or lawyers (or both), with a much smaller proportion dealing with matters such as architecture or engineering. One suggests this is as to be expected as most disputes concern quantum and law and so that lends itself well to adjudicators that are lawyers/quantity surveyors. Such observations are in line with that of the Adjudication Reporting Centre which reports that the two prominent professions for adjudicators are quantity surveying and practising law.

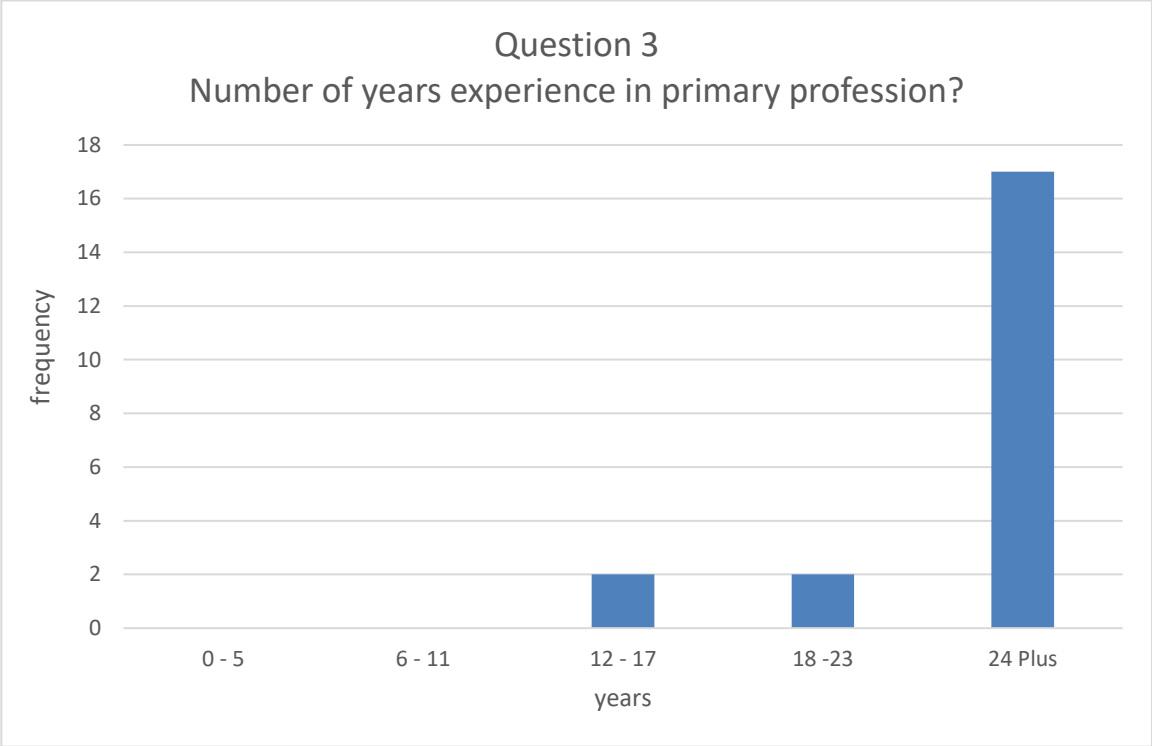

Figure 6.3 Number of years experience in primary profession

6.4.3 Findings

The results from the sample are generally as experienced in industry. Adjudicators tend to be highly experienced in their primary profession and in consequence in the latter part of their career. Most adjudicators tend to have at least 20 years' experience in their primary profession.

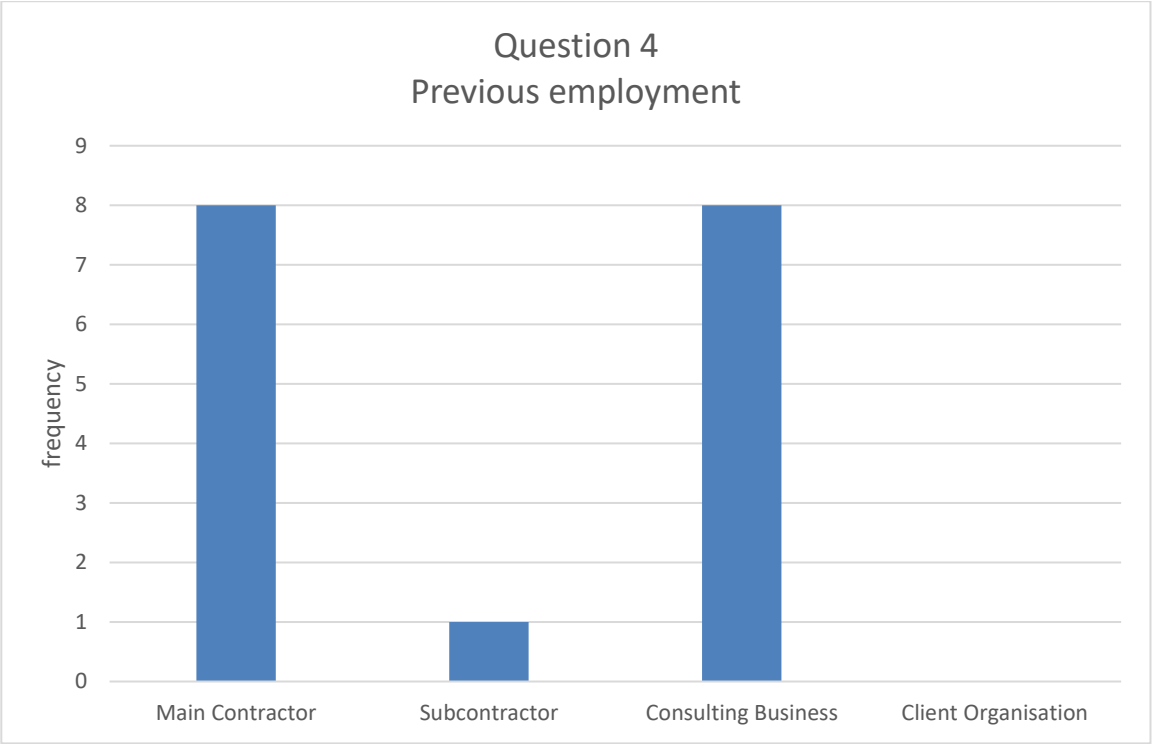

Figure 6.4 Previous employment

6.4.4 Findings

The results from the sample are indicative of the industry insomuch that such adjudicators are typically previously employed in senior level positions within either a contractor or consulting business. Client organisations typically deploy consultants so their representation absence from the sample is largely to be expected.

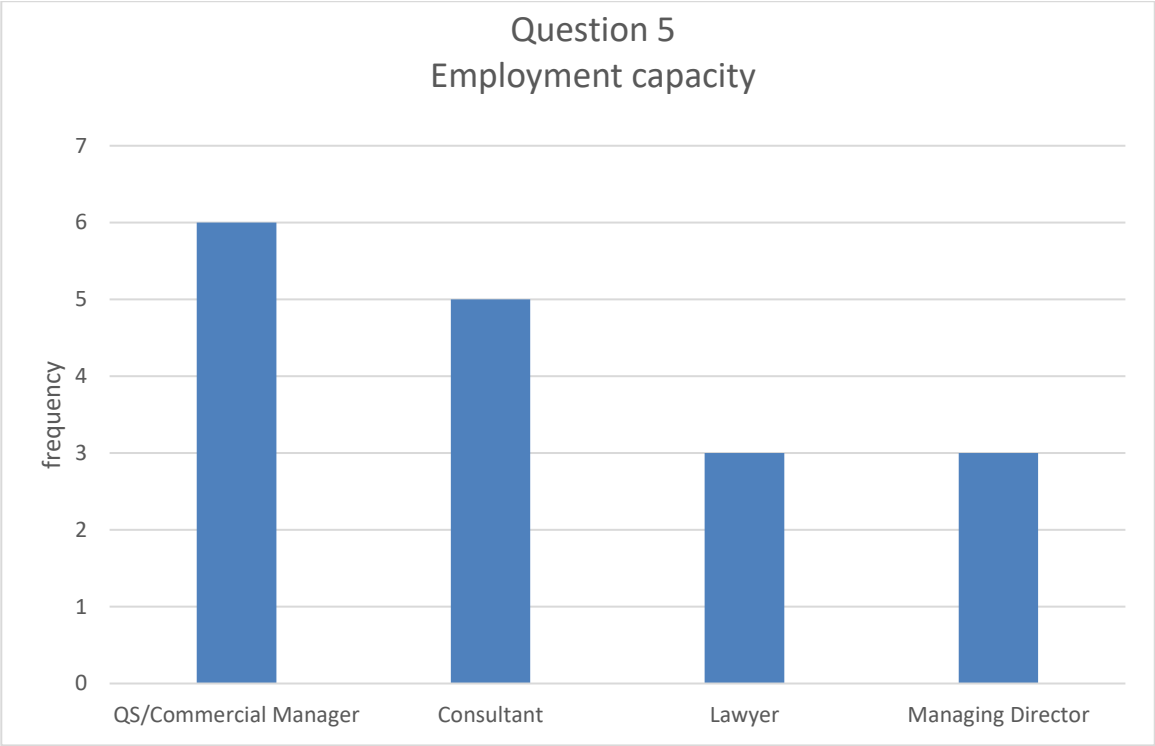

Figure 6.5 Employment capacity

6.4.5 Findings

The sample reinforces the expectation of industry that adjudicators were previously senior level commercial professionals akin to directors or lawyers before specialising in dispute resolution as adjudicators.

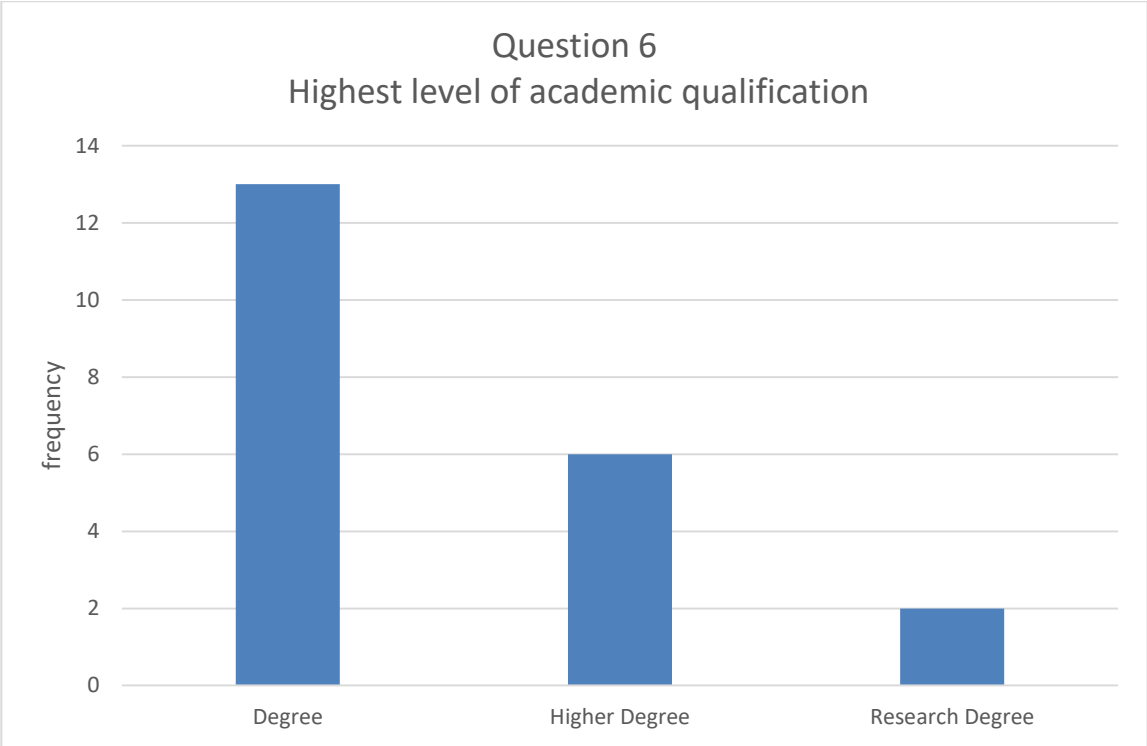

Figure 6.6 Highest level of academic qualification

6.4.6 Findings

The results from the sample support the expectation of industry that an adjudicator would have at least a degree. It then tapers off through a higher degree and doctorate. A not insignificant proportion of the sample do have a higher degree. As one might expect adjudicators are part of the highest level of academic qualification of the general population.

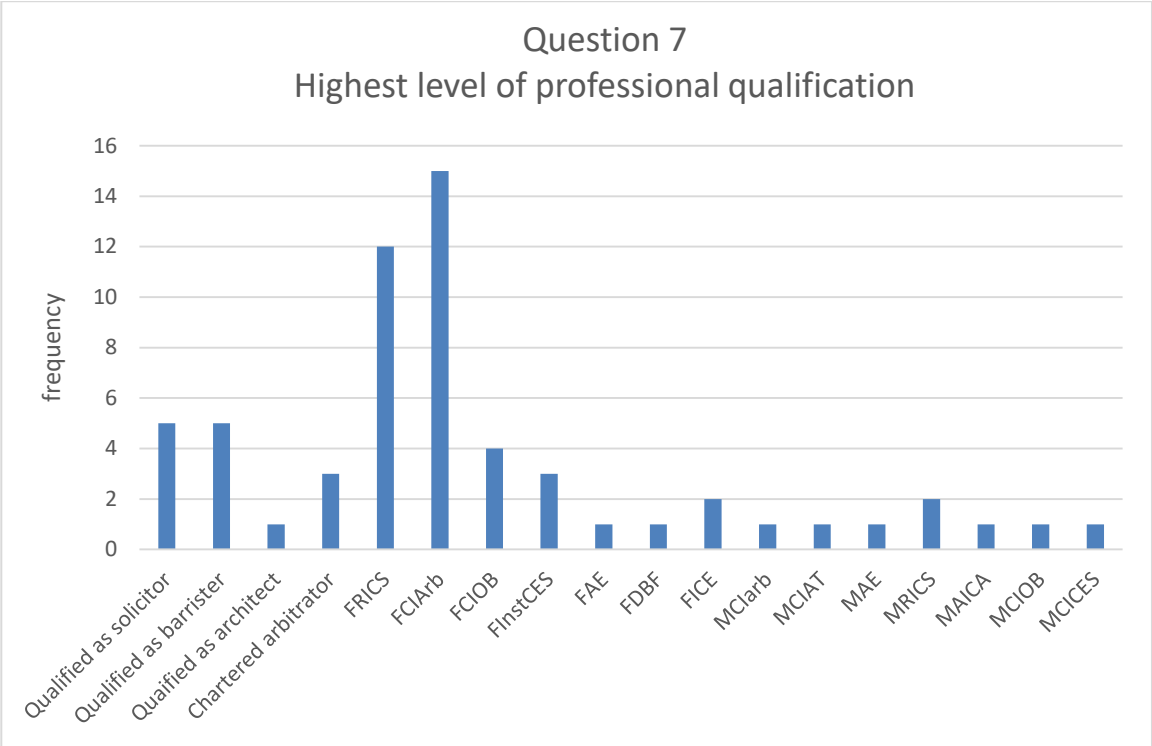

Figure 6.7 Highest level of professional qualification

6.4.7 Findings

The sample displayed quite a large spread of highest level of professional qualification. However, as the primary professions are quantity surveying and practicing law it was perhaps to be anticipated that the largest proportions of the sample would be Fellows of The Chartered Institute of Arbitrators or Fellows of the Royal Institution of Chartered Surveyors.

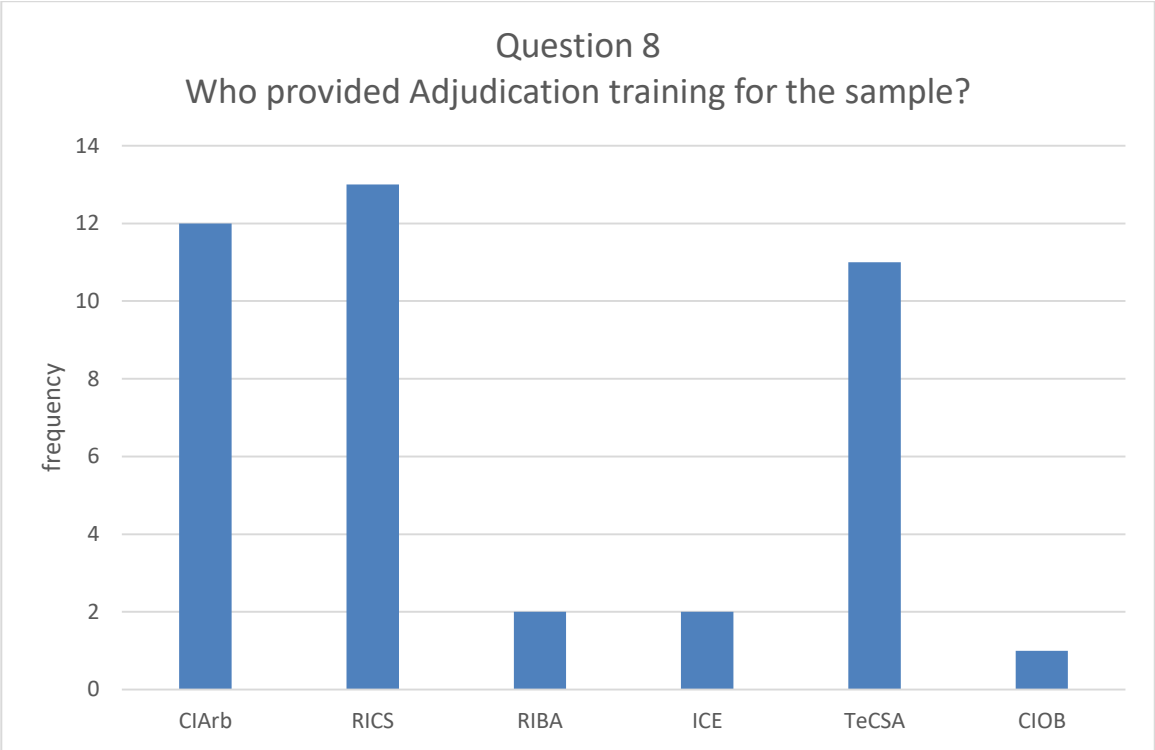

Figure 6.8 Who provided Adjudication training for the sample?

6.4.8 Findings

The results from the sample appear to reflect professions and memberships of institutions. The CIArb and RICS providing training to the largest proportions supports two things; they are both very popular Adjudicator Nominating Bodies and they have a high proportion of Fellows from the results in question 7. TeCSA trains solicitors and training by TeCSA is a requirement for listing on the panel of TeCSA adjudicators so the relationship is plain. The other institutes are significantly less well known for training of adjudicators and make far fewer nominations. In particular, the CIOB is not very active in this regard.

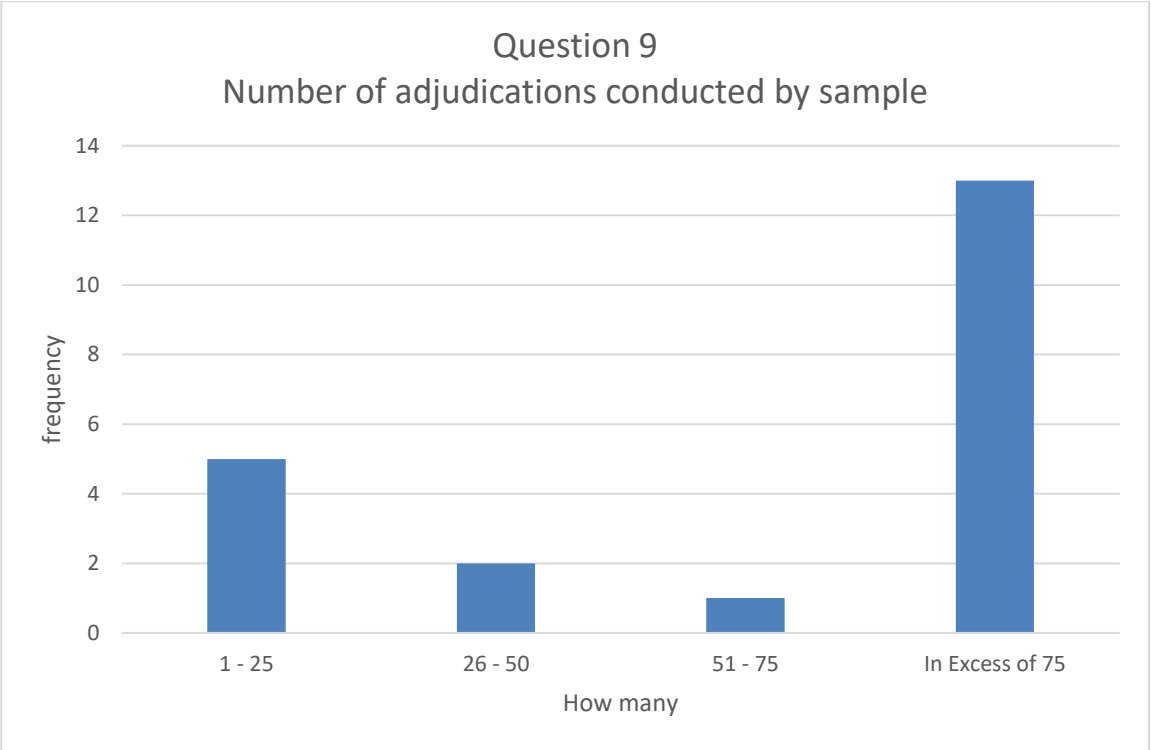

Figure 6.9 Number of adjudications conducted by sample

6.4.9 Findings

The sample results demonstrated that most adjudicators had done more than 75 adjudications which suggests that they are reasonably regularly utilised, which further suggests at least a degree of satisfaction from the users of the adjudication process. That said there were, in second place so to speak, some adjudicators that had done between 1 and 25 adjudications, which suggests that they are new to the arena or that they are not regularly utilised; the reasoning for this is unclear.

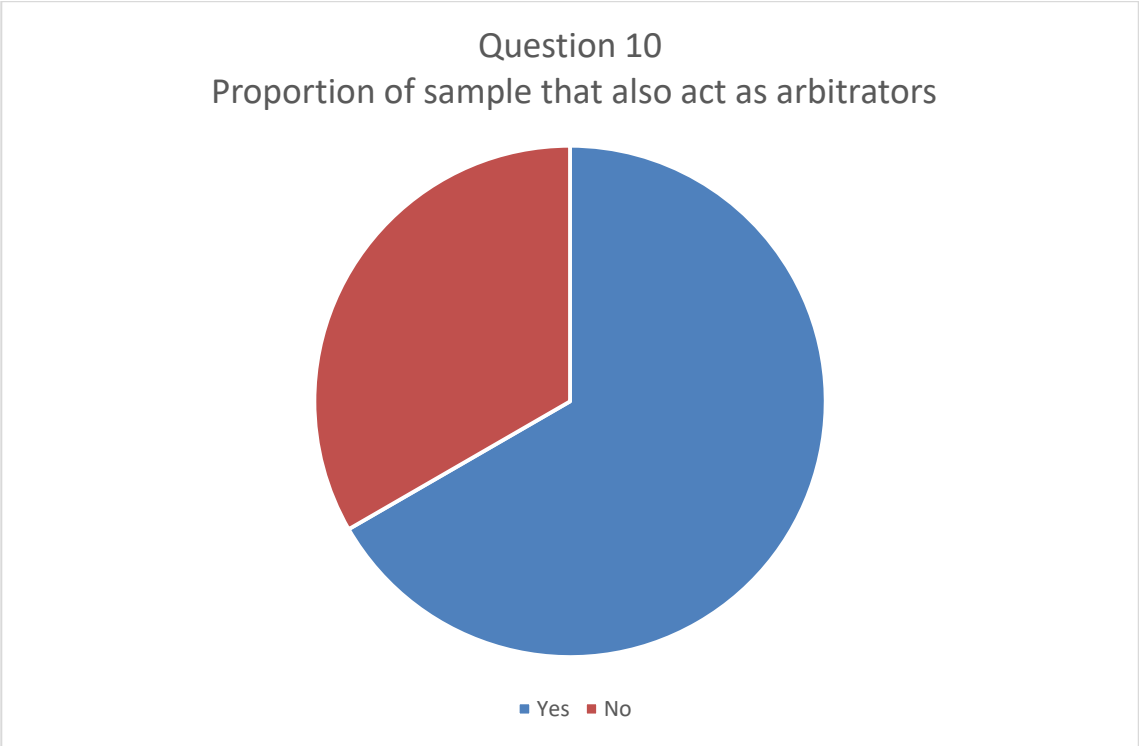

Figure 6.10 Proportion of sample that also act as arbitrators

6.4.10 Findings

It is interesting that the larger proportion of adjudicators in the sample are also arbitrators. It is argued, anecdotally, that adjudicators that are also arbitrators are more deliberative in their decision-making process in adjudication – as would ordinarily be expected in arbitration. It is also argued that arbitrators are more likely to be aware of the risk of bias. The sample has a good mix of arbitrators and those that are not arbitrators for the purposes of testing attitudes in the latter part of the research questionnaire.

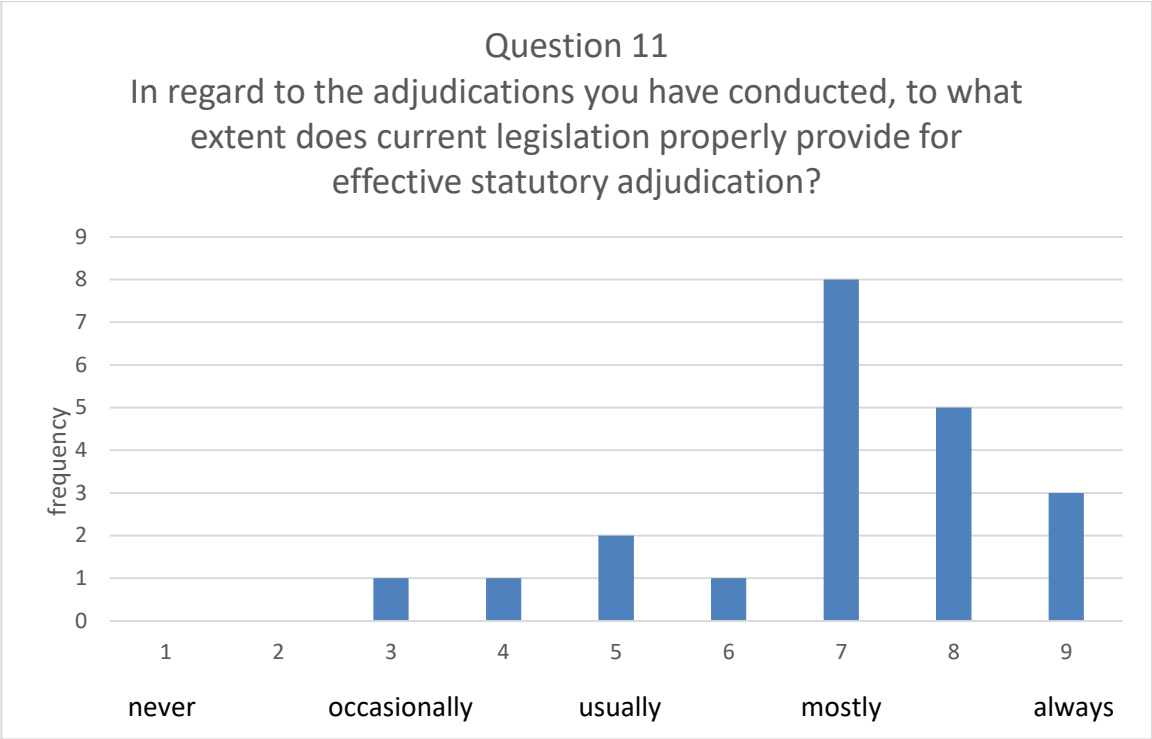

Figure 6.11 In regard to the adjudications you have conducted, to what extent does current legislation properly provide for effective statutory adjudication?

6.4.11 Findings

Mean response: 7.0

Standard deviation: 1.56

The sample results suggest that the legislation is generally effective, albeit it would appear plain that further improvement to the legislation would ultimately benefit the process of adjudication in most cases.

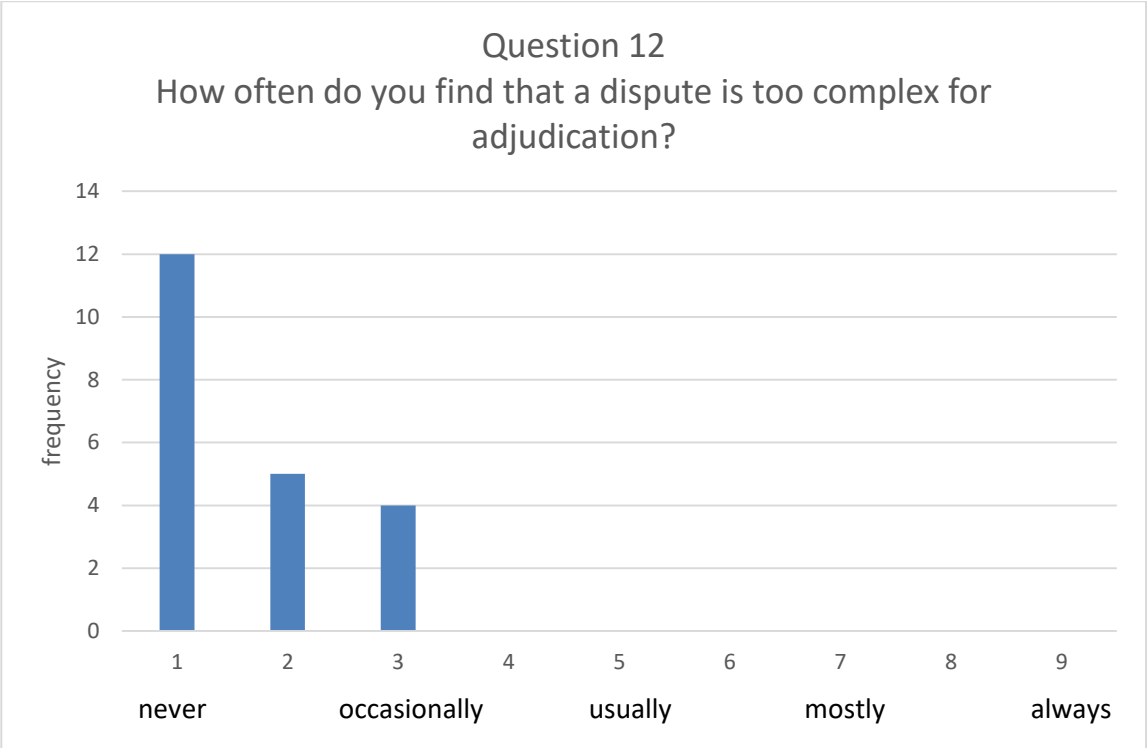

Figure 6.12 How often do you find that a dispute is too complex for adjudication?

6.4.12 Findings

Mean response: 1.6

Standard deviation: 0.79

The results suggest that the sample consider that a dispute is rarely too complex for adjudication.

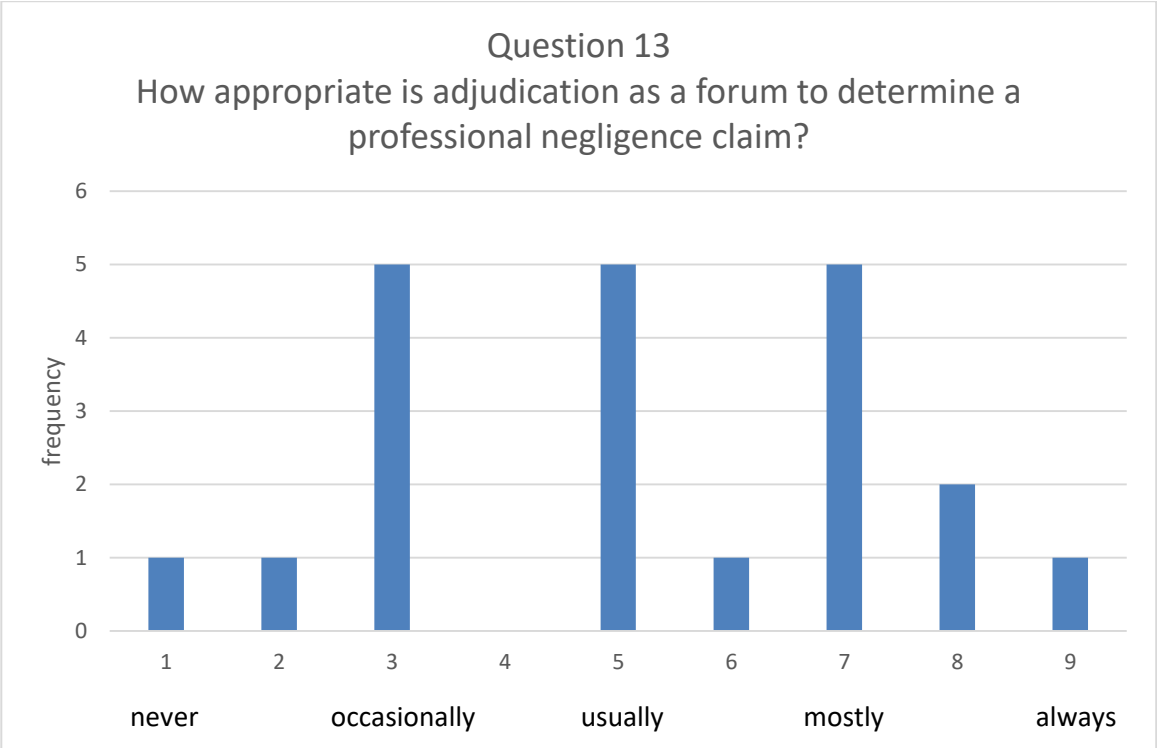

Figure 6.13 How appropriate is adjudication as a forum to determine a professional negligence claim?

6.4.13 Findings

Mean response: 5.2

Standard deviation: 2.17

The results to this question are interesting given that professional negligence claims are by their very nature complex. In contrast with question 12 the standard deviation is larger. It would appear that the sample does not agree on the appropriateness of adjudication for professional negligence disputes and their views are widely spread, which is in contrast to the complex dispute question at 12.

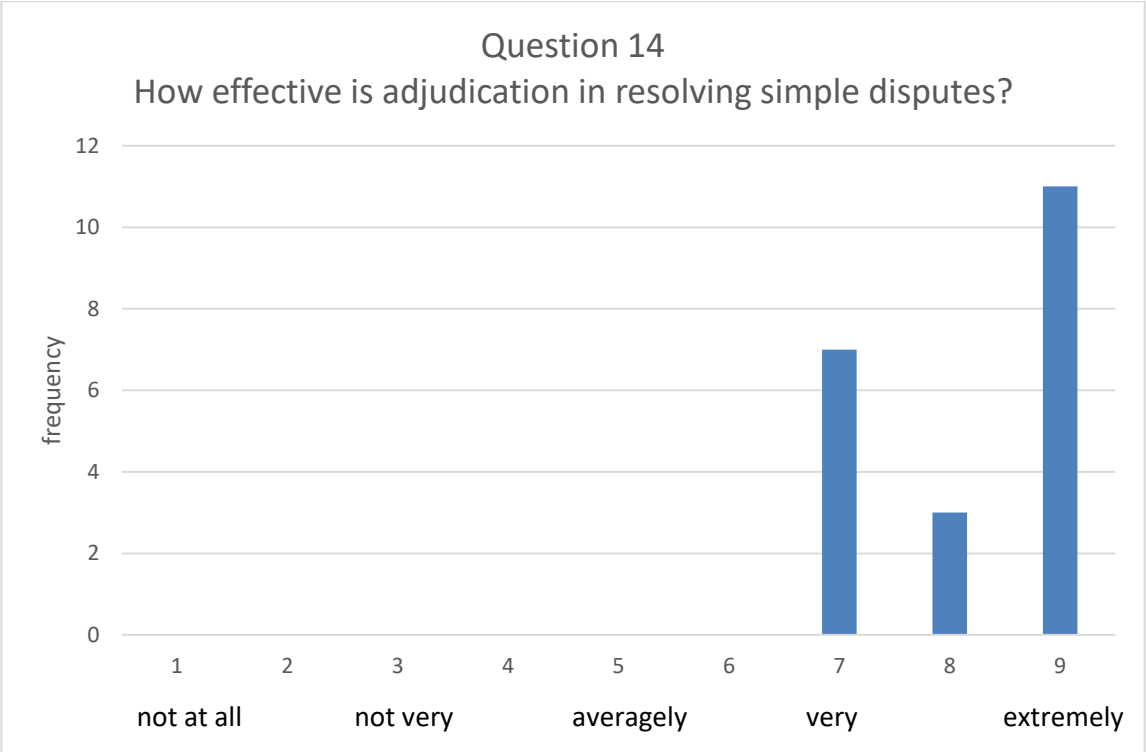

Figure 6.14 How effective is adjudication in resolving simple disputes?

6.4.14 Findings

Mean response: 8.2

Standard deviation: 0.91

The results to this question correlate to support the original intention of adjudication – the resolution of simple construction disputes. The sample agree that adjudication is either very to extremely effective for resolving such disputes.

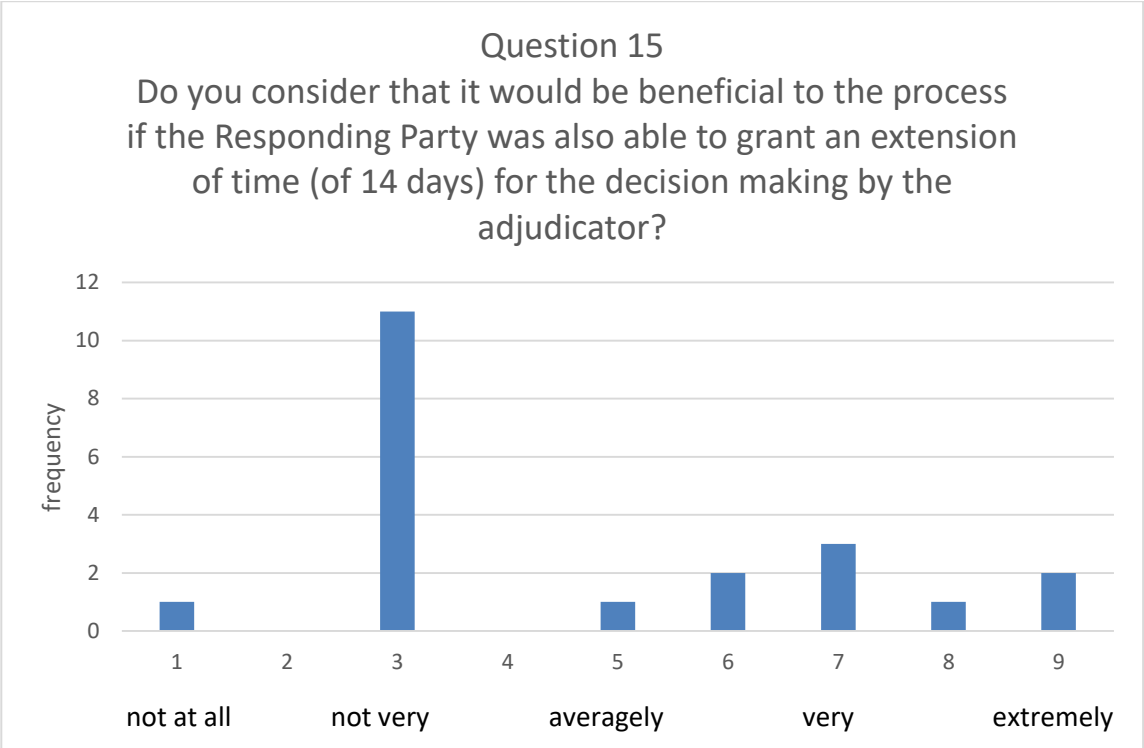

Figure 6.15 Do you consider that it would be beneficial to the process if the Responding Party was also able to grant an extension of time (of 14 days) for the decision-making by the adjudicator?

6.4.15 Findings

Mean response: 4.7

Standard deviation: 2.32

The results indicate a large standard deviation and therefore it is plain that opinion of the sample varies quite significantly. However, it is perhaps surprising that in the most common response selection that the sample of the adjudicators do not consider it beneficial to have a level playing field between the referring and responding party in terms of extending time.

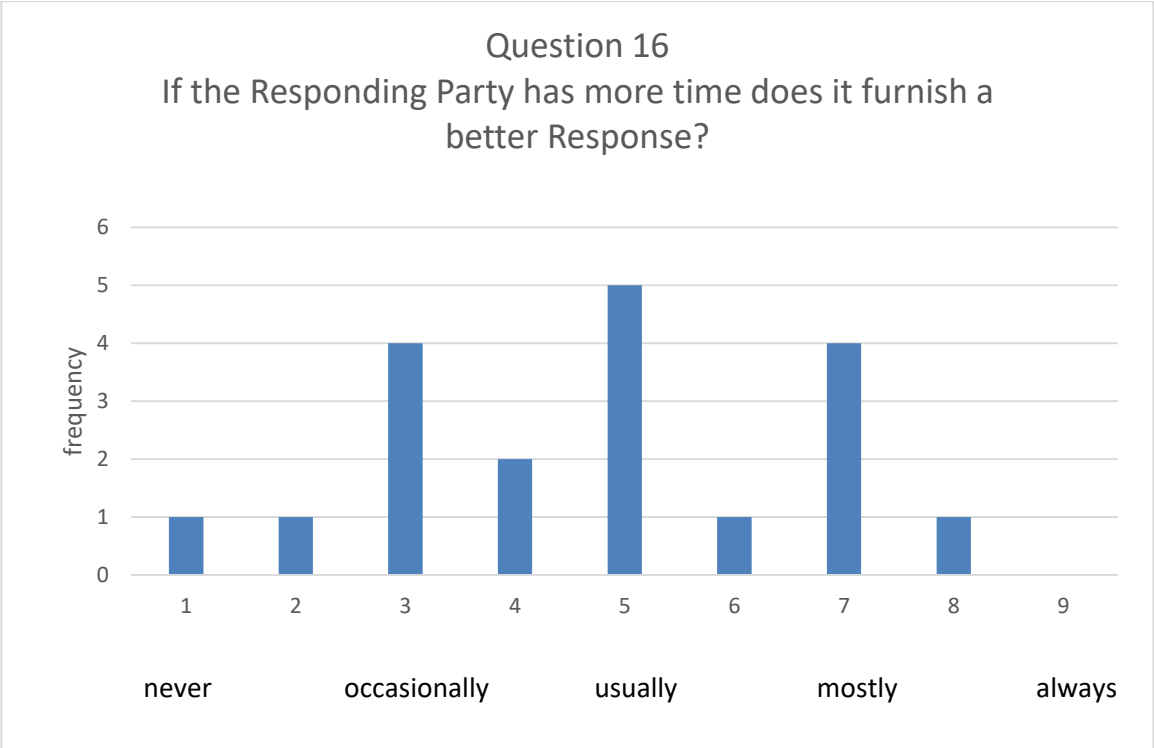

Figure 6.16 If the Responding Party has more time does it furnish a better Response?

6.4.16 Findings

Mean response: 4.7

Standard deviation: 1.89

The results indicate (and should be cross referenced to question 15) that the sample generally considers that the responding party more likely does (but not always) furnish a better Response if they are allowed more time.

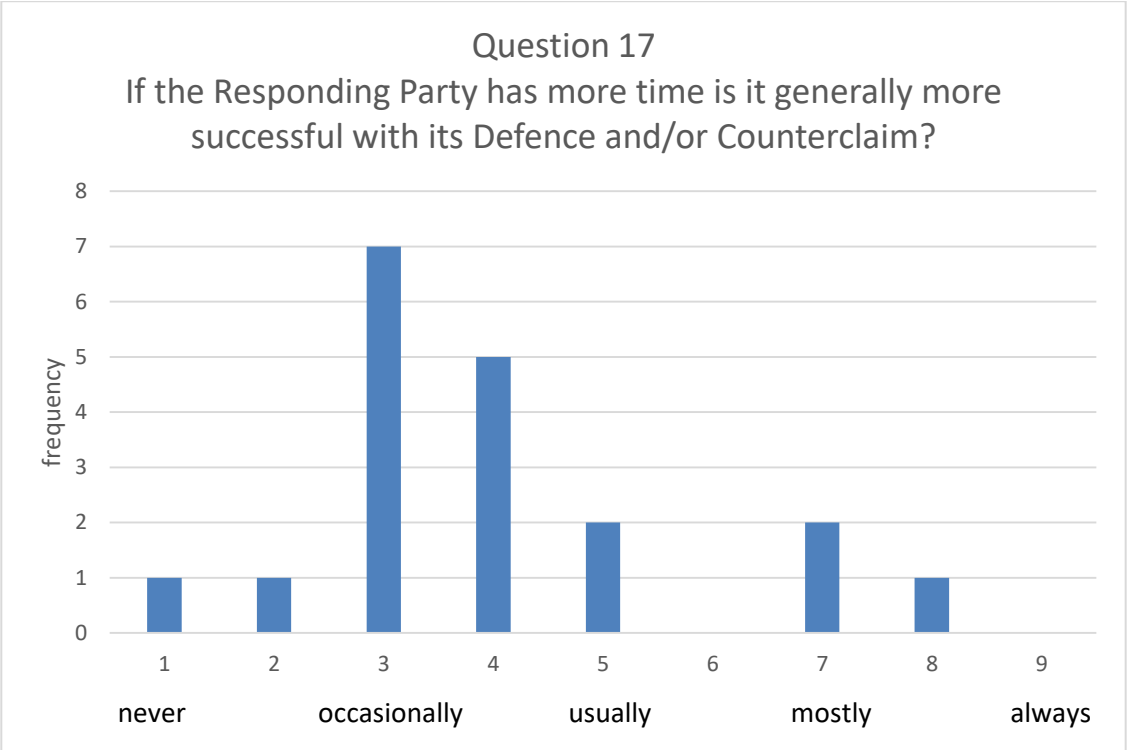

Figure 6.17 If the Responding Party has more time is it generally more successful with its Defence and/or Counterclaim?

6.4.17 Findings

Mean response: 4.0

Standard deviation: 1.72

The results from the sample suggest that more time generally leads to the responding party being likely more successful, albeit not on a continuing basis as far as the sample opine.

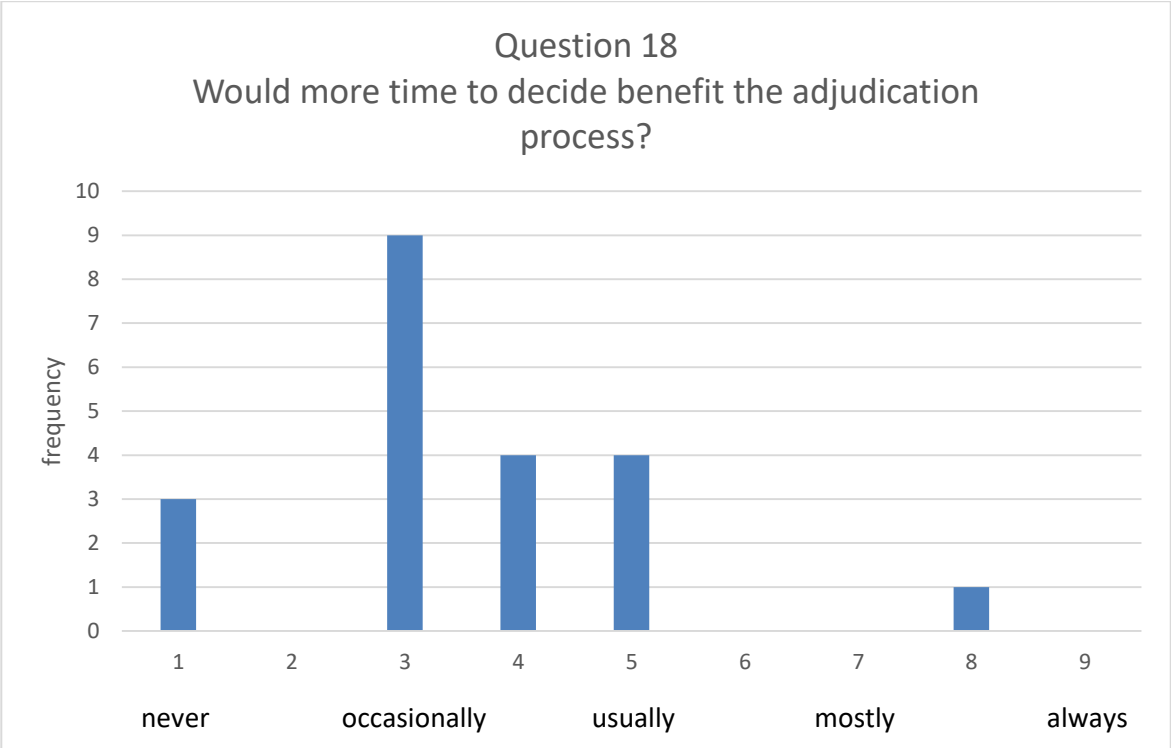

Figure 6.18 Would more time to decide benefit the adjudication process?

6.4.18 Findings

Mean response: 3.5

Standard deviation: 1.56

The results from the sample suggest that more time to decide would benefit the process, but that is not applicable in all instances. Rather it appears to suggest that it might depend on the individual dispute. One submits it would be difficult for legislation to provide for every variance in a dispute but at least occasionally more time would be beneficial.

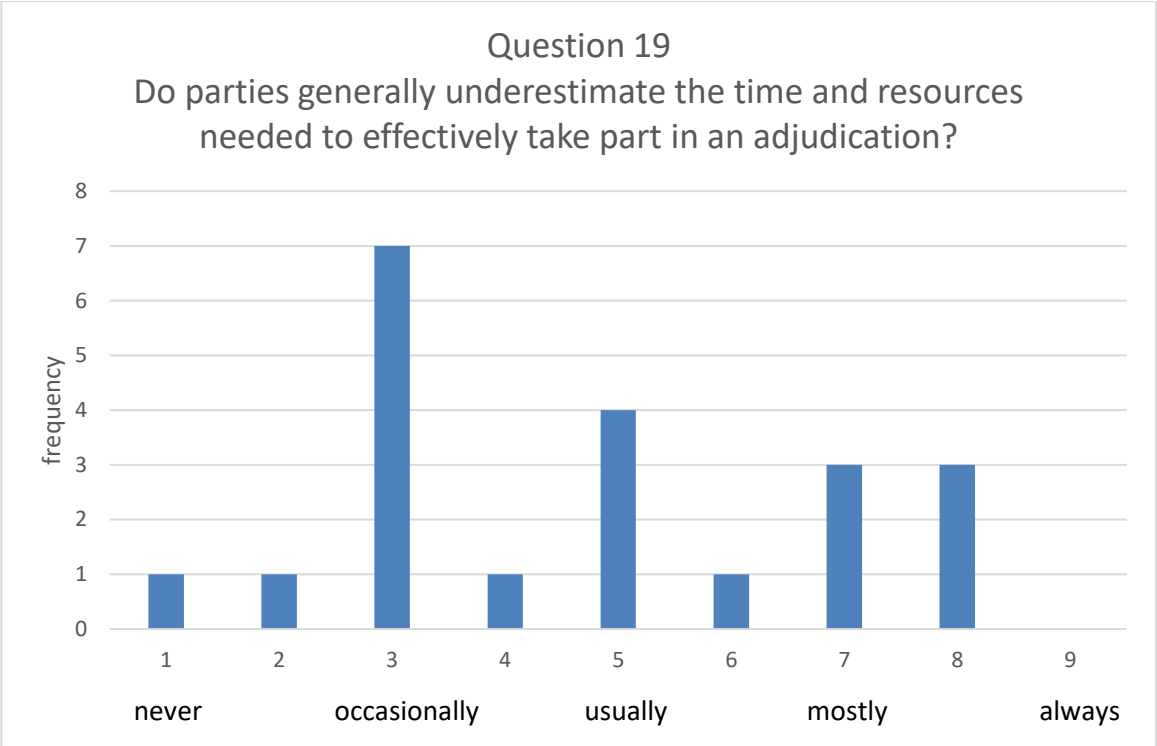

Figure 6.19 Do parties generally underestimate the time and resources needed to effectively take part in an adjudication?

6.4.19 Findings

Mean response: 4.7

Standard deviation: 2.1

The results would appear to reflect the anecdotal views of industry insomuch that it appears more likely than not that the parties will under estimate the resources needed to effectively take part in an adjudication.

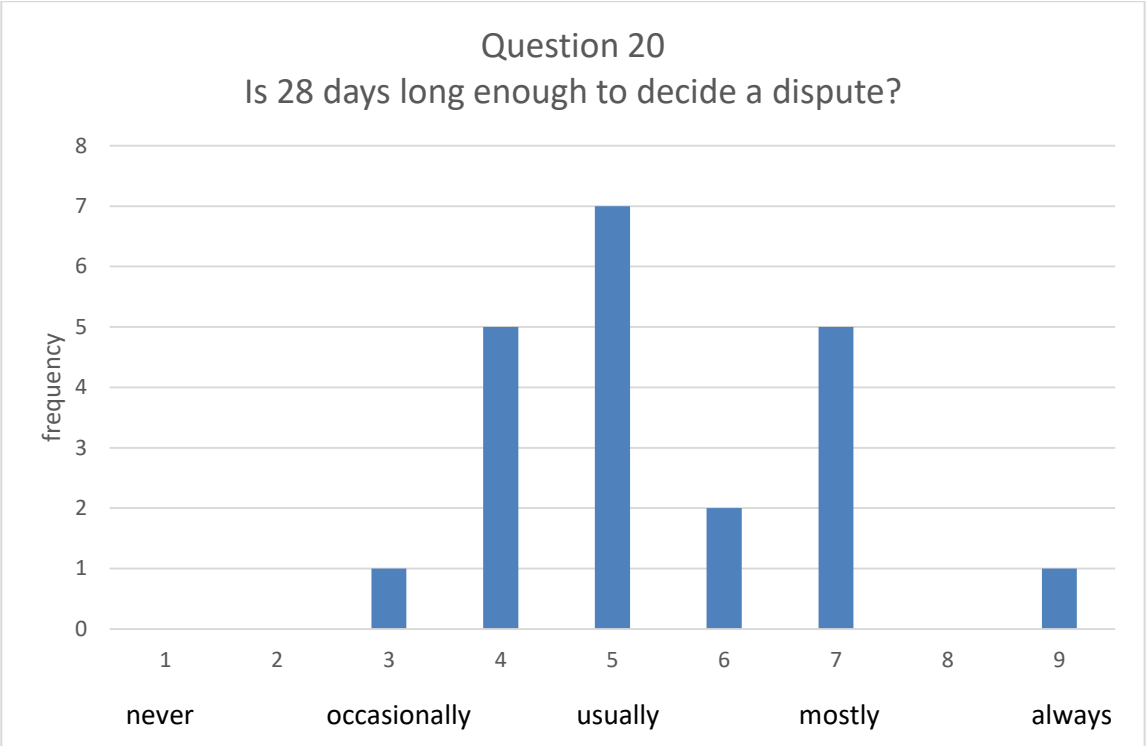

Figure 6.20 Is 28 days long enough to decide a dispute?

6.4.20 Findings

Mean response: 5.4

Standard deviation: 1.43

The results suggest that the sample generally considers that 28 days is sufficient to decide a dispute in the majority of instances.

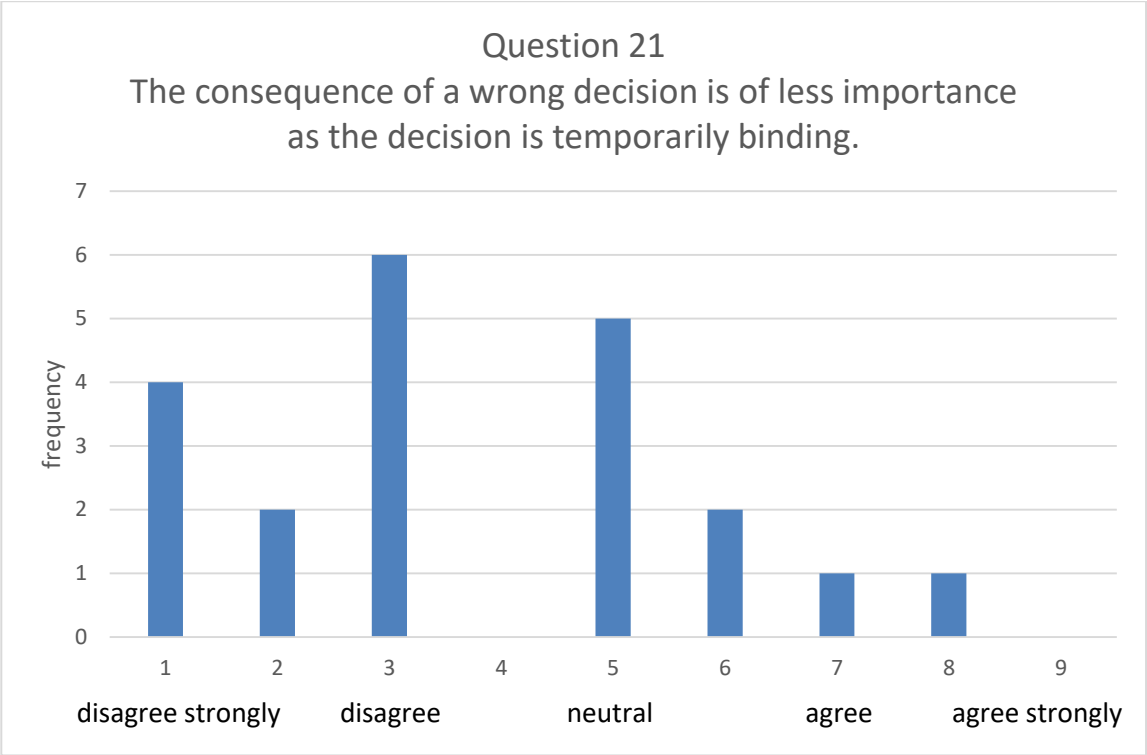

Figure 6.21 The consequence of a wrong decision is of less importance as the decision is temporarily binding.

6.4.21 Findings

Mean response: 3.7

Standard deviation: 2.03

The sample largely disagree or are neutral. It's not clear but industry suggests that the decision should be as important whether temporary or final. The sample does not entirely agree with that view.

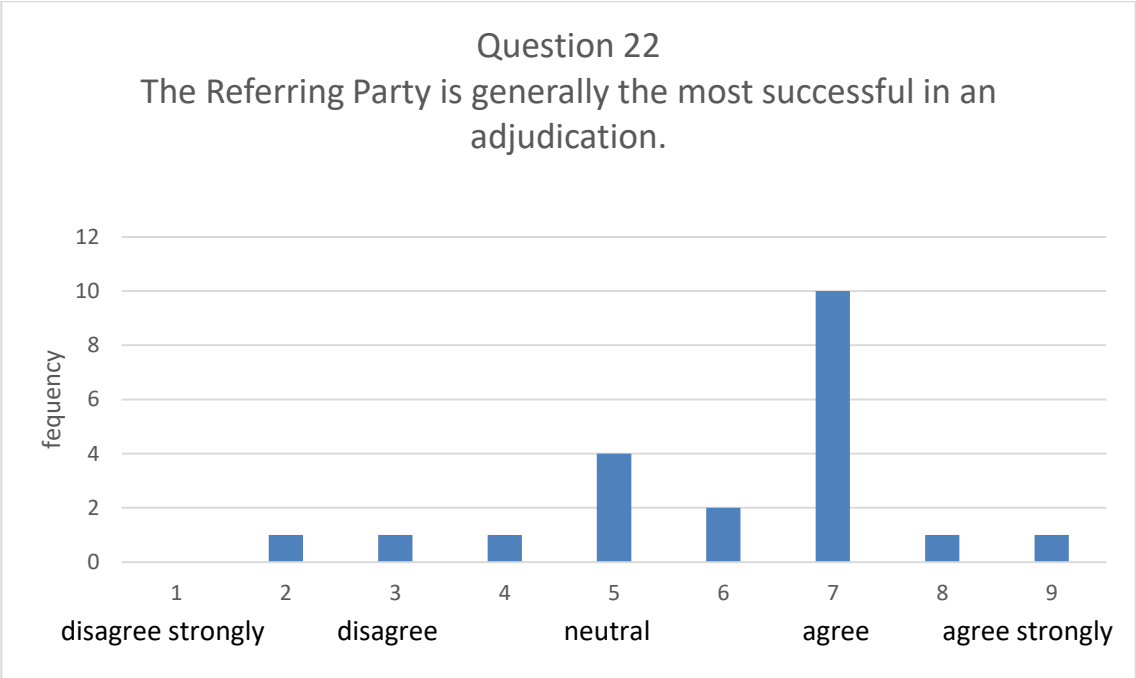

Figure 6.22 The Referring Party is generally the most successful in an adjudication.

6.4.22 Findings

Mean response: 6.1

Standard deviation: 1.63

The sample results suggest that the adjudicators generally express the same view as the Adjudication Reporting Centre reports and that is that the Referring Party tends to be the more successful party in an adjudication.

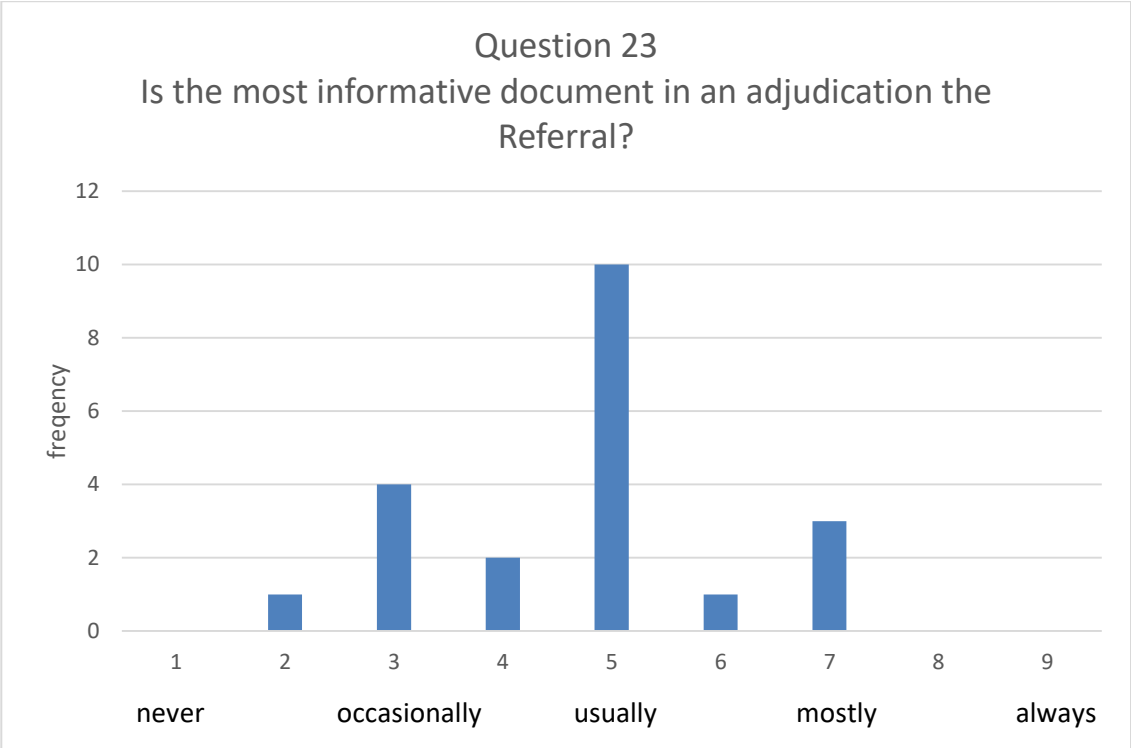

Figure 6.23 Is the most informative document in an adjudication the Referral?

6.4.23 Findings

Mean response: 4.7

Standard deviation: 1.35

The sample results generally reflect the fact that the Referral is usually the most informative document in an adjudication.

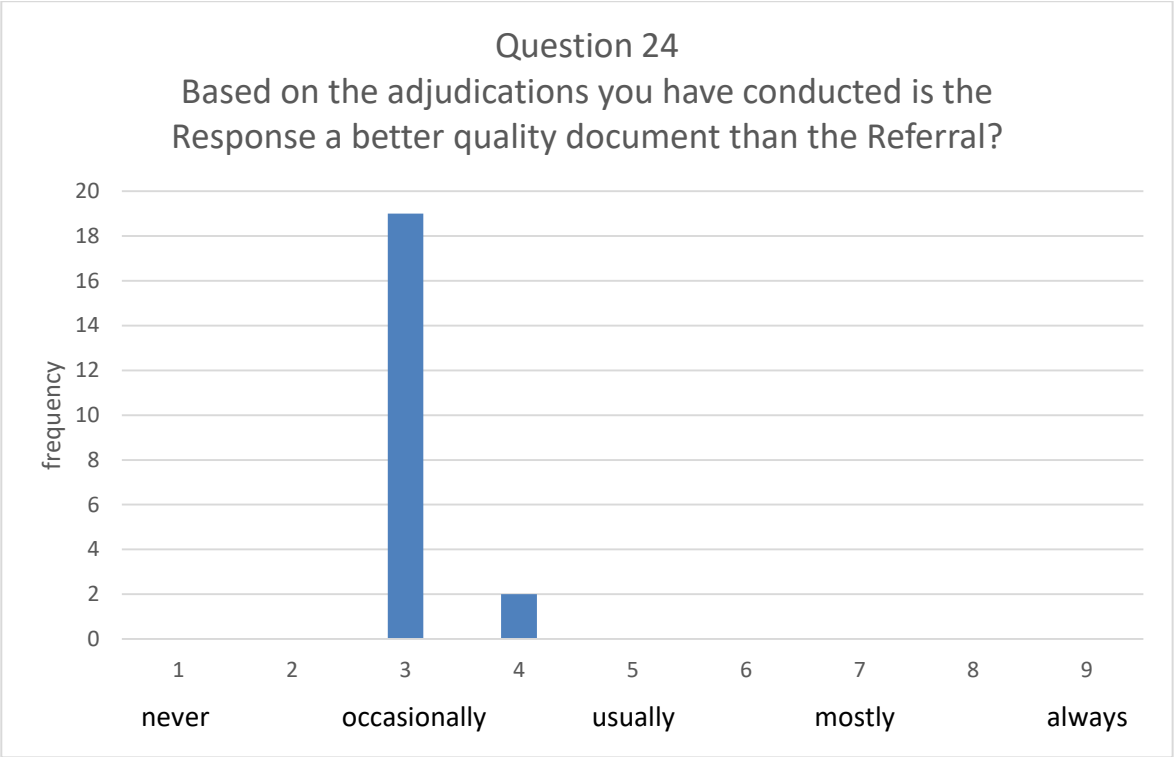

Figure 6.24 Based on the adjudications you have conducted is the Response a better quality document than the Referral?

6.4.24 Findings

Mean response: 3.1

Standard deviation: 0.29

The sample results suggest that the Response is only occasionally a better quality document than the Referral. It would appear to be unlikely that a Response is a better quality document.

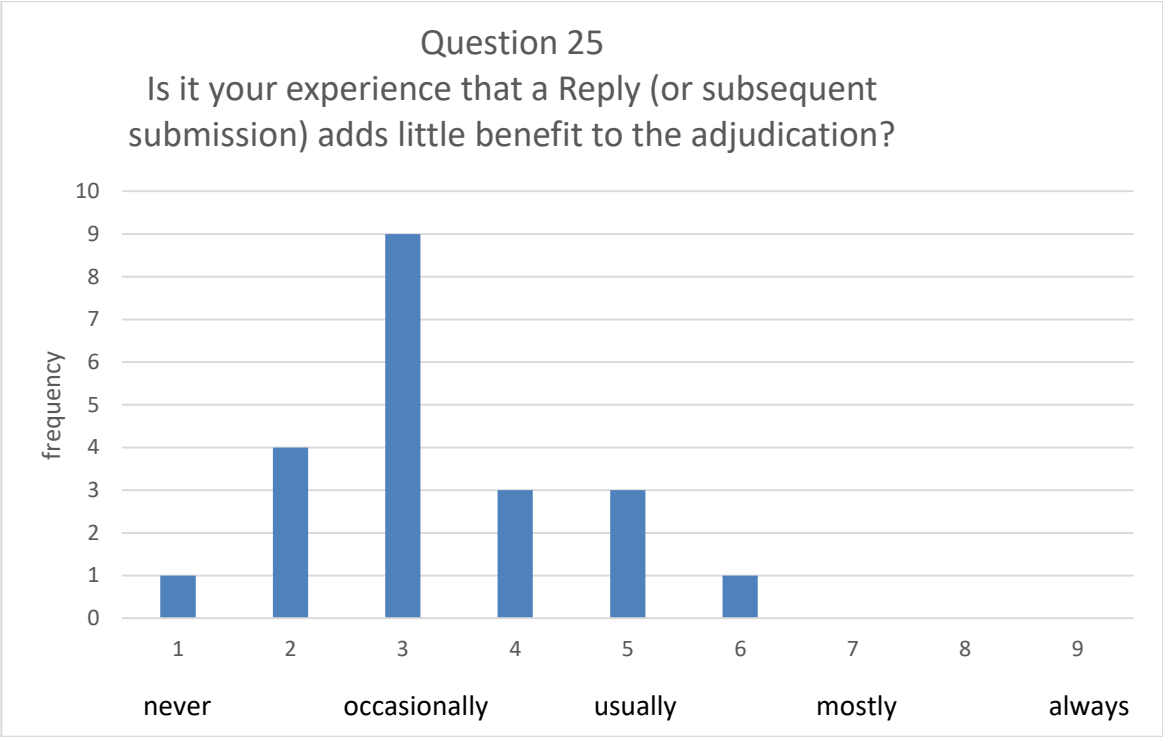

Figure 6.25 Is it your experience that a Reply (or subsequent submission) adds little benefit to the adjudication?

6.4.25 Findings

Mean response: 3.3

Standard deviation: 1.2

The sample results suggest that a Reply (or subsequent submission) rarely adds much benefit to the adjudication.

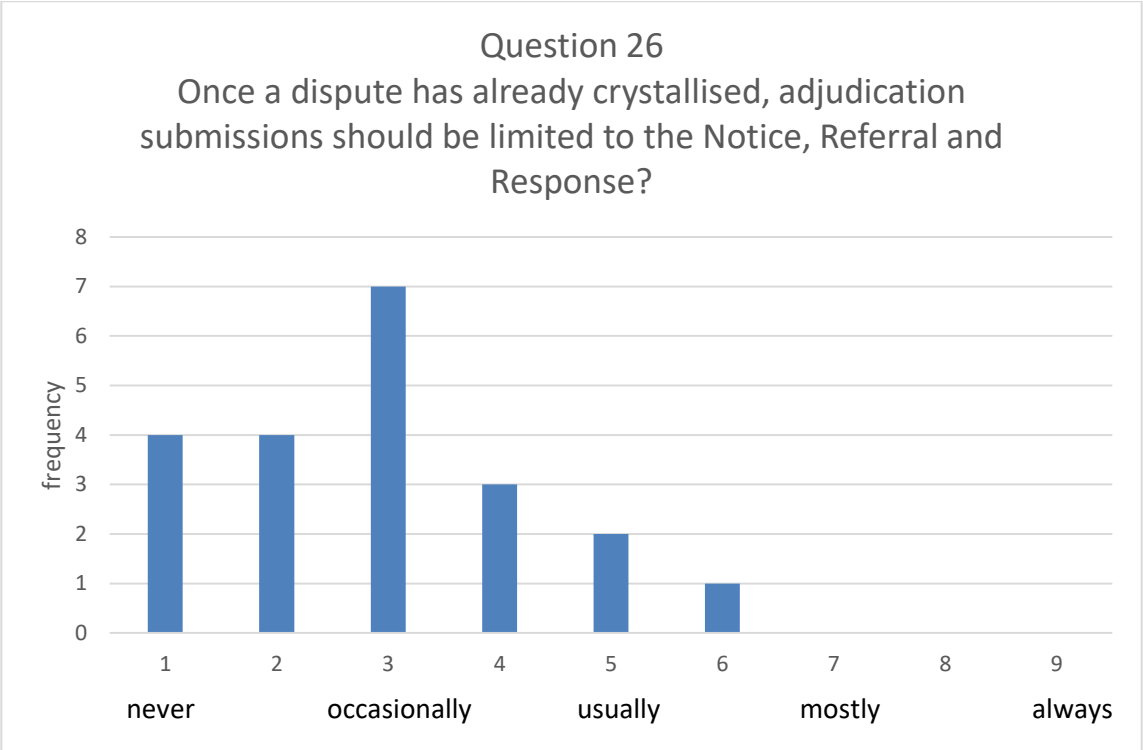

Figure 6.26 Once a dispute has already crystallised, adjudication submissions should be limited to the Notice, Referral and Response?

6.4.26 Findings

Mean response: 2.9

Standard deviation: 1.38

The sample results suggest that adjudicators from the sample would generally only want to limit submissions occasionally and in general they rarely or never consider such limitations beneficial.

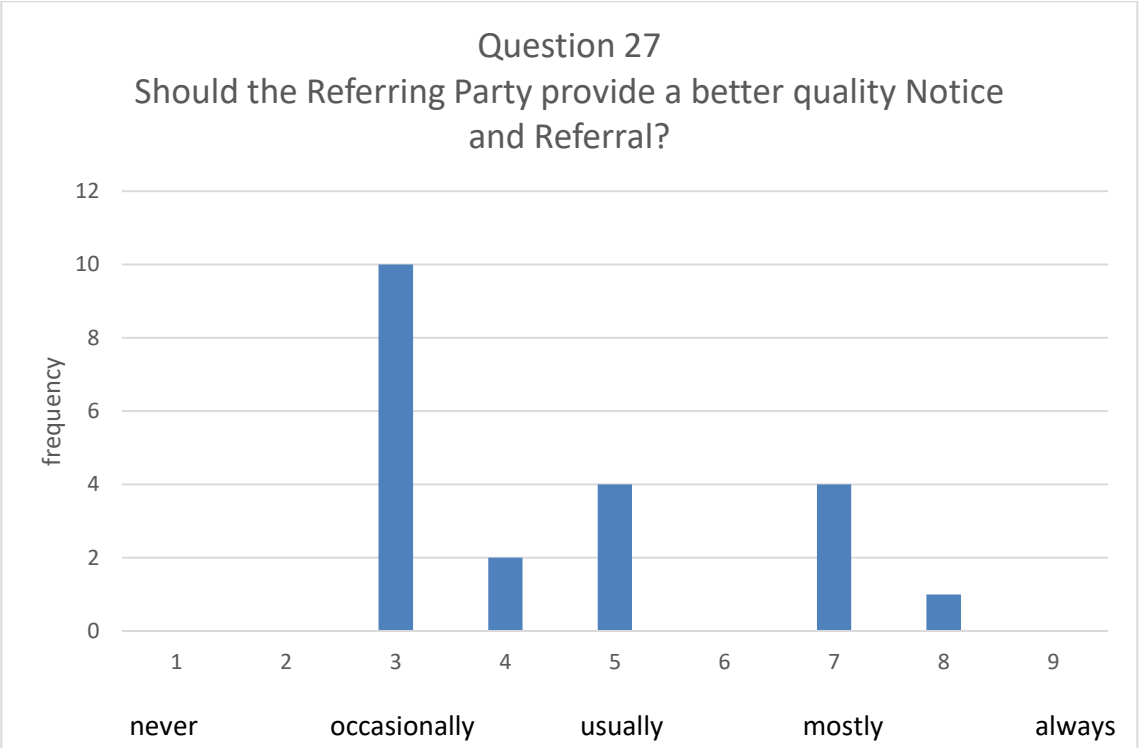

Figure 6.27 Should the Referring Party provide a better quality Notice and Referral?

6.4.27 Findings

Mean response: 4.5

Standard deviation: 1.71

The sample results indicate that Notices of Referral are never perfect and sometimes should be of better quality.

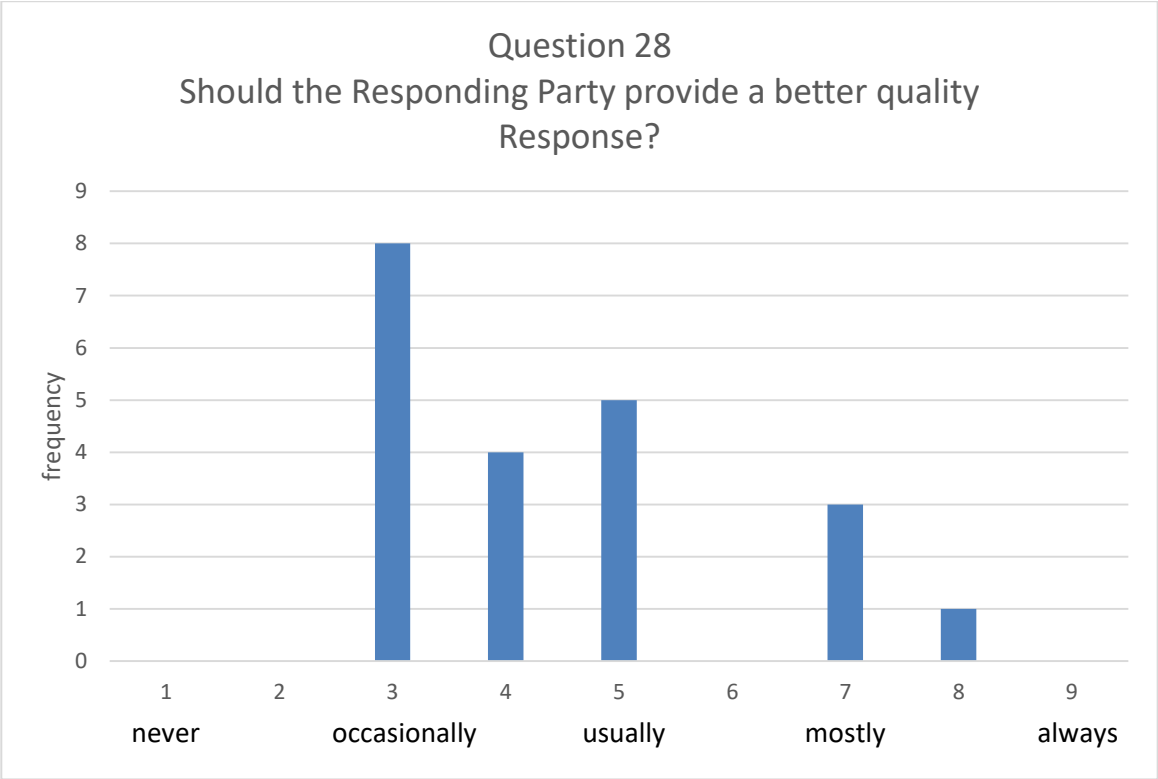

Figure 6.28 Should the Responding Party provide a better quality Response?

6.4.28 Findings

Mean response: 4.5

Standard deviation: 1.56

The sample results indicate that Responses should generally be of a better quality.

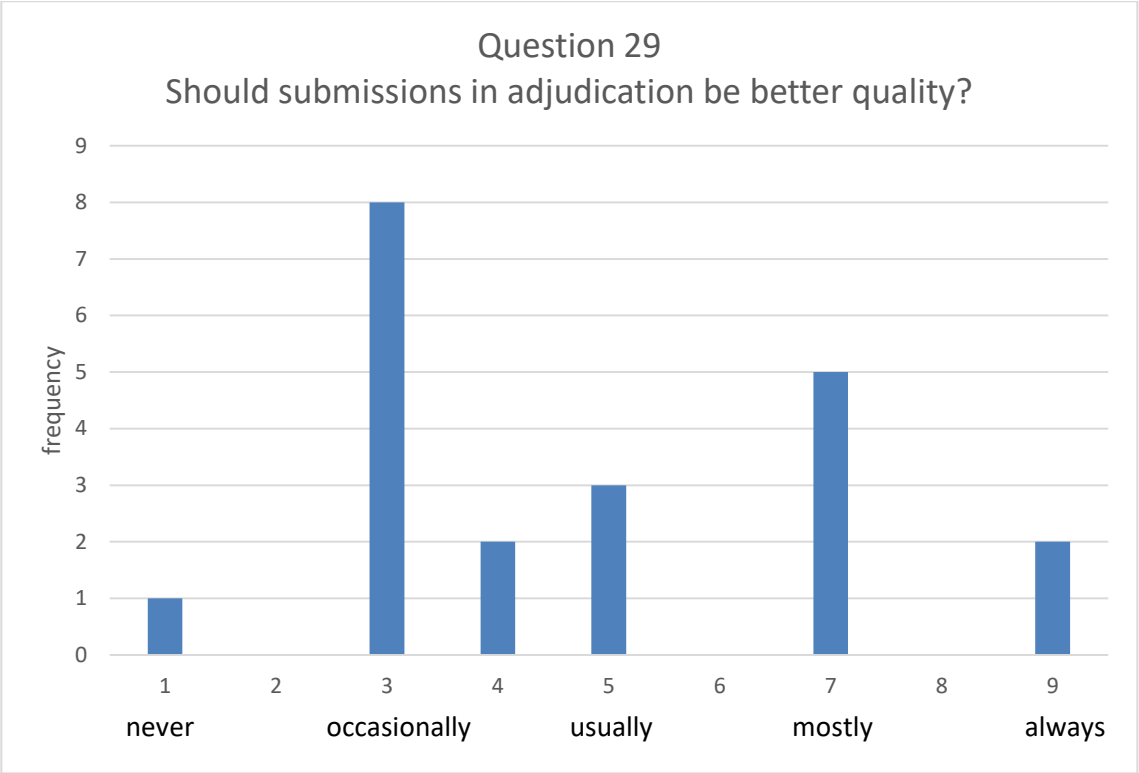

Figure 6.29 Should submissions in adjudication be better quality?

6.4.29 Findings

Mean response: 4.8

Standard deviation: 2.2

The sample results largely suggest that at least occasionally submissions should be better quality. Interestingly some of the sample go to usually and mostly with two going to always which suggests submissions in adjudication really should be better quality.

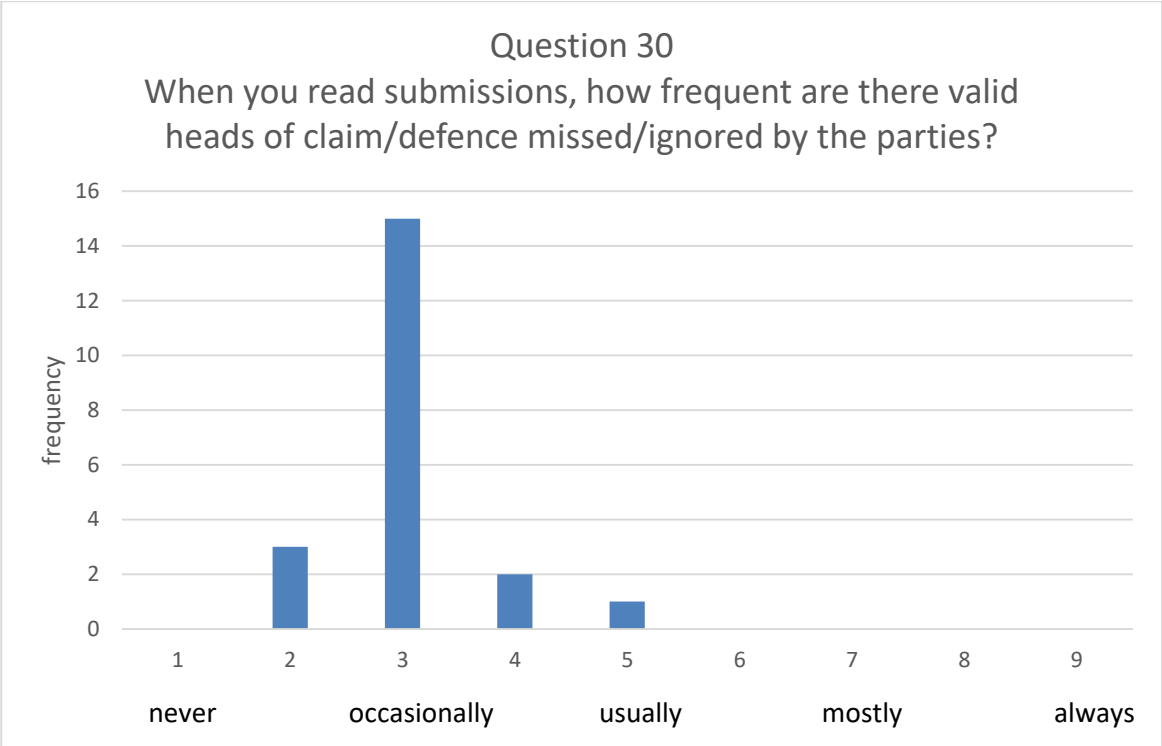

Figure 6.30 When you read submissions, how frequent are there valid heads of claim/defence missed/ignored by the parties?

6.4.30 Findings

Mean response: 3.0

Standard deviation: 0.65

The sample results indicate that it is only occasionally that the parties miss valid heads of claim or defence. This suggests that cases are reasonably well researched by the parties before they are adjudicated.

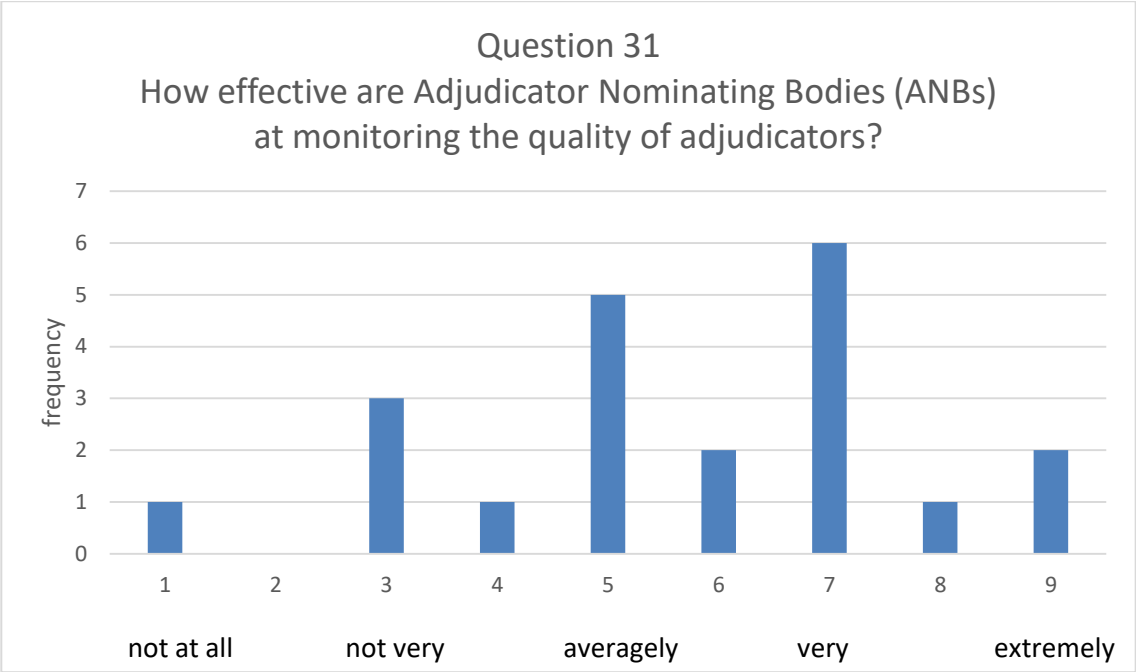

Figure 6.31 How effective are Adjudicator Nominating Bodies (ANBs) at monitoring the quality of adjudicators?

6.4.31 Findings

Mean response: 5.7

Standard deviation: 2.08

The sample results suggest a wide variance of opinion from the adjudicators. It is possible, although not clear, that the variance depends on the Adjudicator Nominating Body. Some are said to be much more proactive than others.

Figure 6.32 Is it apparent to you that some adjudicators would benefit from further training?

6.4.32 Findings

Mean response: 4.2

Standard deviation: 1.77

The sample appears to recognise that at least some adjudicators would benefit from further training.

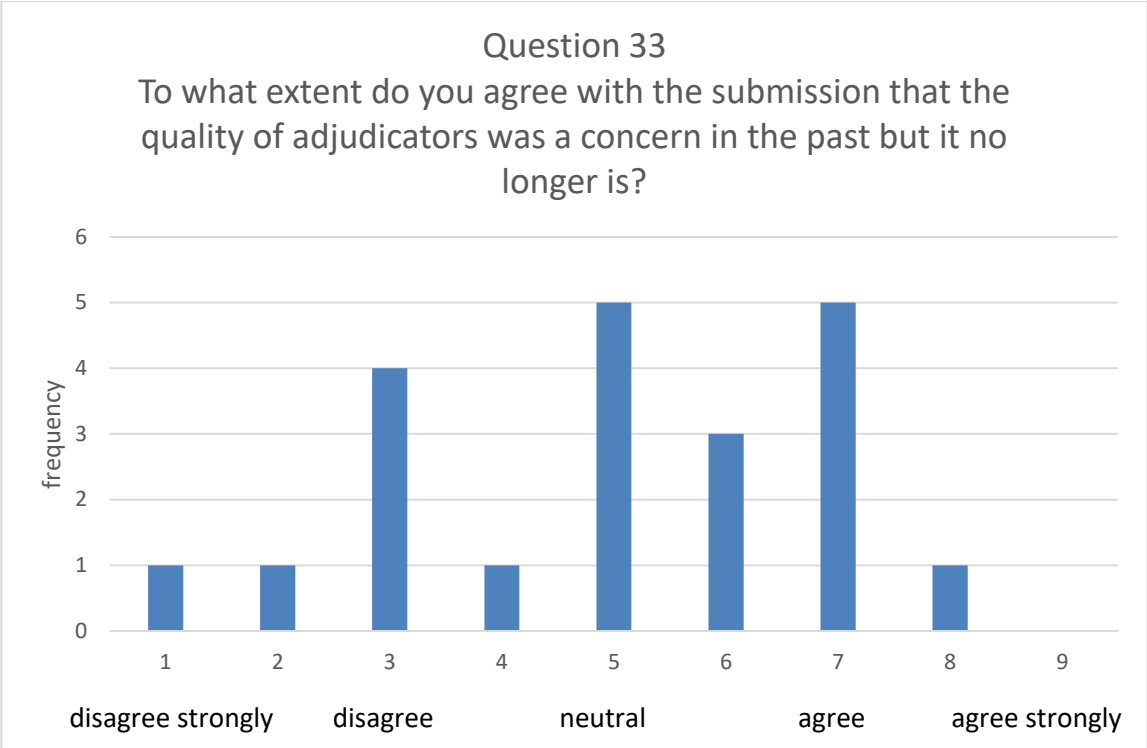

Figure 6.33 To what extent do you agree with the submission that the quality of adjudicators was a concern in the past but it no longer is?

6.4.33 Findings

Mean response: 5.0

Standard deviation: 1.88

The sample results indicate that there is disagreement as to whether the quality of adjudicators was a concern in the past but no longer is. The largest proportion remain fairly neutral which suggests the question is difficult to answer, especially as almost as many of the sample disagree as agree.

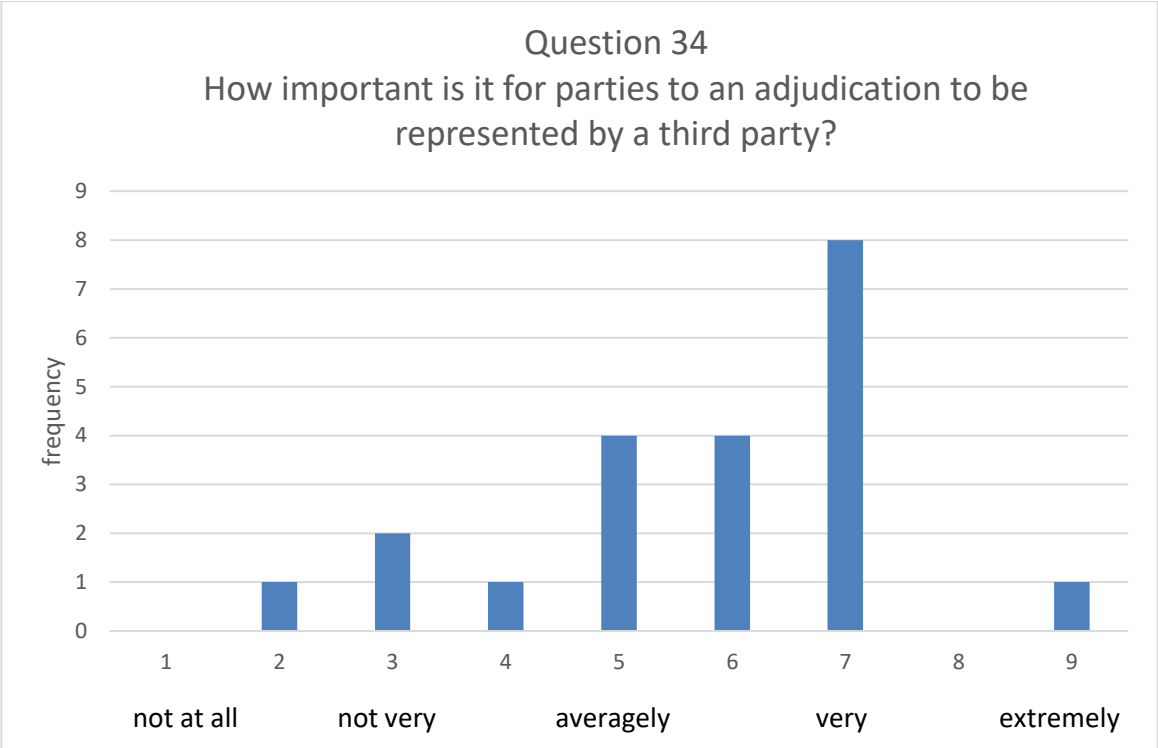

Figure 6.34 How important is it for parties to an adjudication to be represented by a third party?

6.4.34 Findings

Mean response: 5.8

Standard deviation: 1.66

The sample results largely suggest that a party to an adjudication should benefit from being represented by a third party and that it is therefore important that parties are.

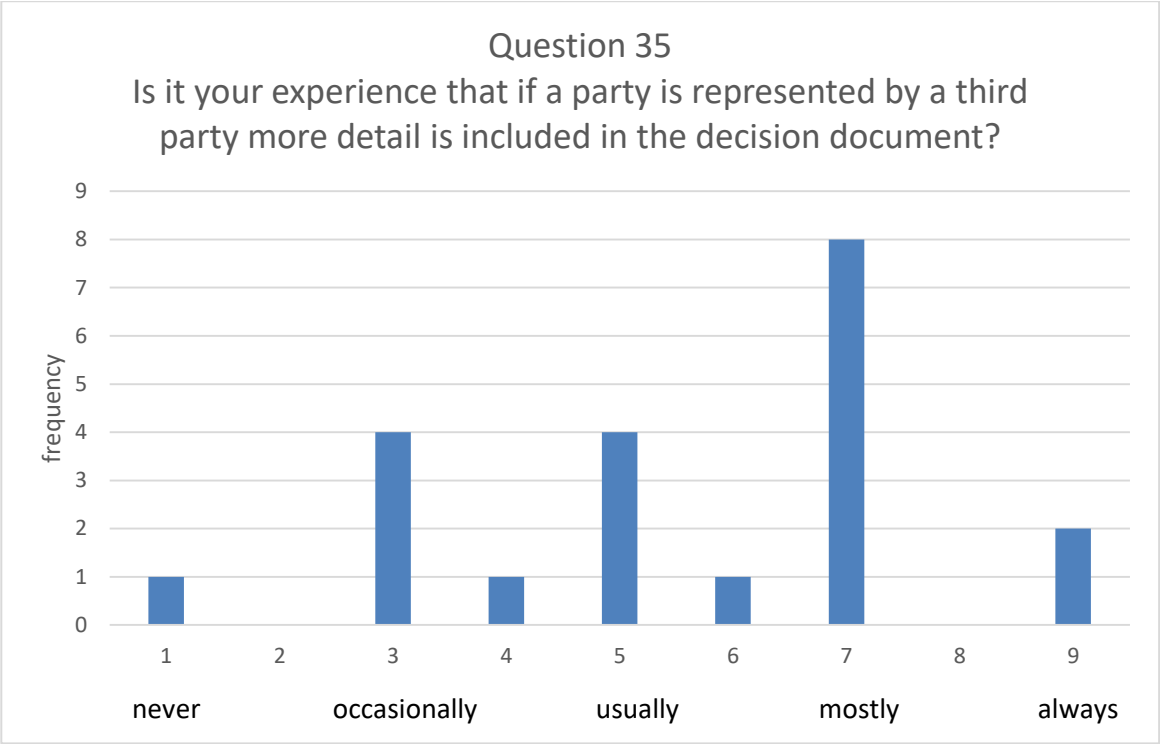

Figure 6.35 Is it your experience that if a party is represented by a third party more detail is included in the decision document?

6.4.35 Findings

Mean response: 5.6

Standard deviation: 2.08

The sample results appear to largely support the submission that an adjudicator is likely to include more detail in his decision if the parties are represented. Some suggest that this leads to a more deliberative decision by an adjudicator – albeit that is speculative.

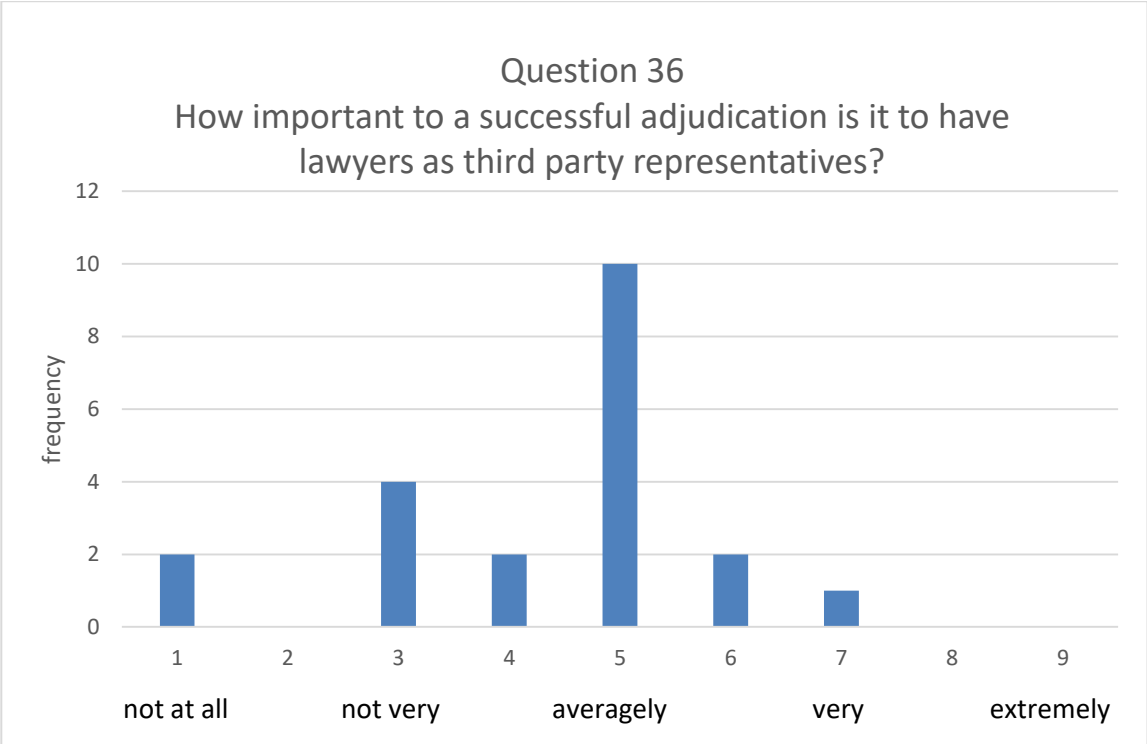

Figure 6.36 How important to a successful adjudication is it to have lawyers as third party representatives?

6.4.36 Findings

Mean response: 4.3

Standard deviation: 1.49

The sample results suggest that it is only averagely important for a party to be represented by a lawyer, which by contrast to question 34 appears to suggest that other representatives, such as claims consultants validly contribute as third party representatives.

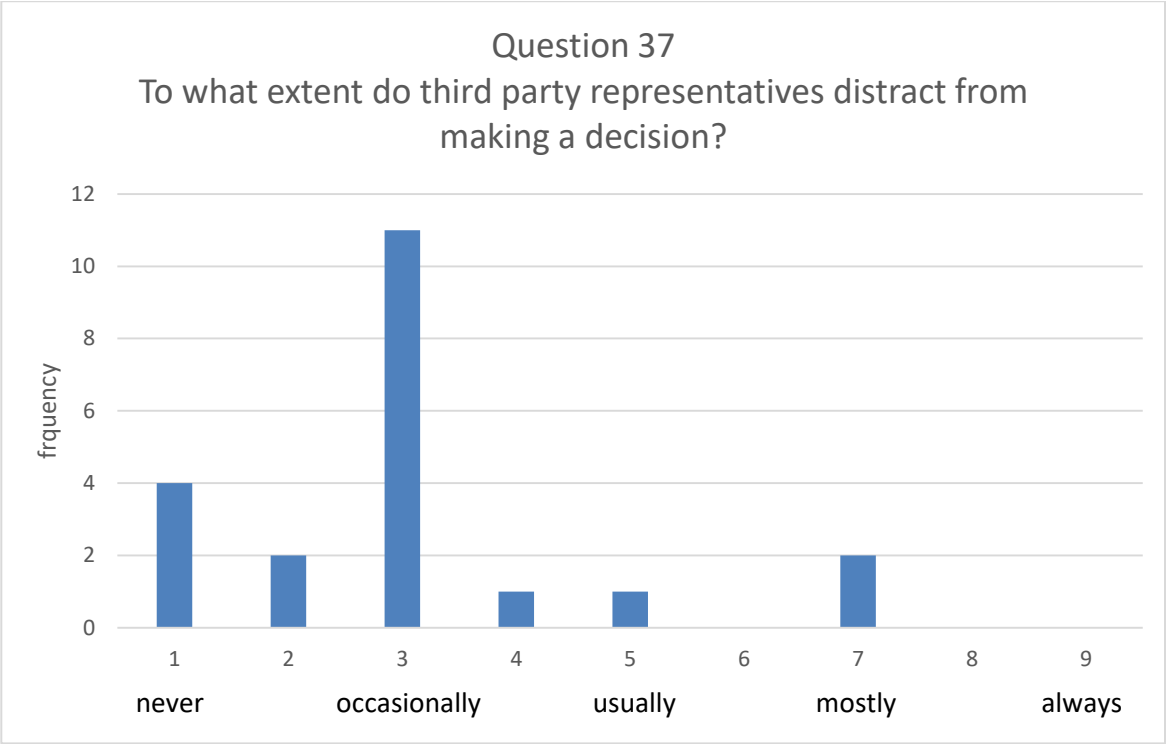

Figure 6.37 To what extent do third party representatives distract from making a decision?

6.4.37 Findings

Mean response: 3.0

Standard deviation: 1.62

The sample results suggest that it is largely only occasionally that third party representatives distract the adjudicator making a decision. Further, some opine that that is never or almost never the case.

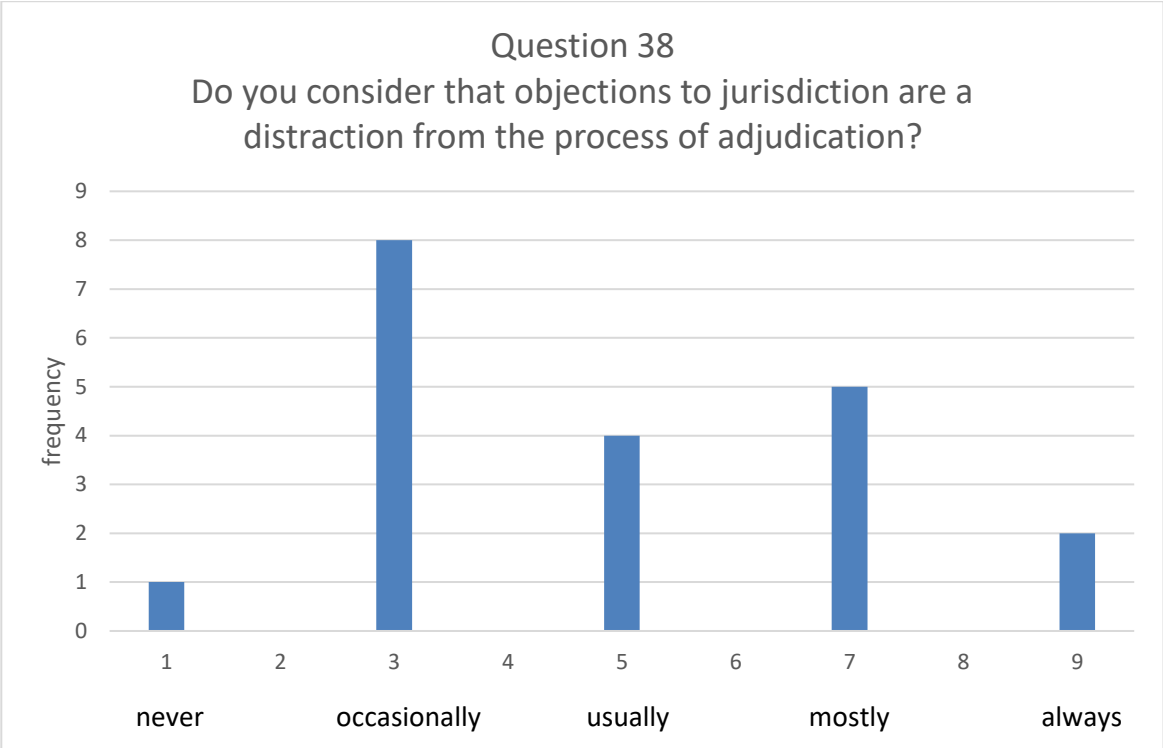

Figure 6.38 Do you consider that objections to jurisdiction are a distraction from the process of adjudication?

6.4.38 Findings

Mean response: 4.9

Standard deviation: 2.23

The sample results suggest that at least occasionally the objections to jurisdiction distract from the process of adjudication with the remaining majority suggesting that such objections are commonly a distraction. Plainly such objections are not, on balance, considered positively by adjudicators from the sample.

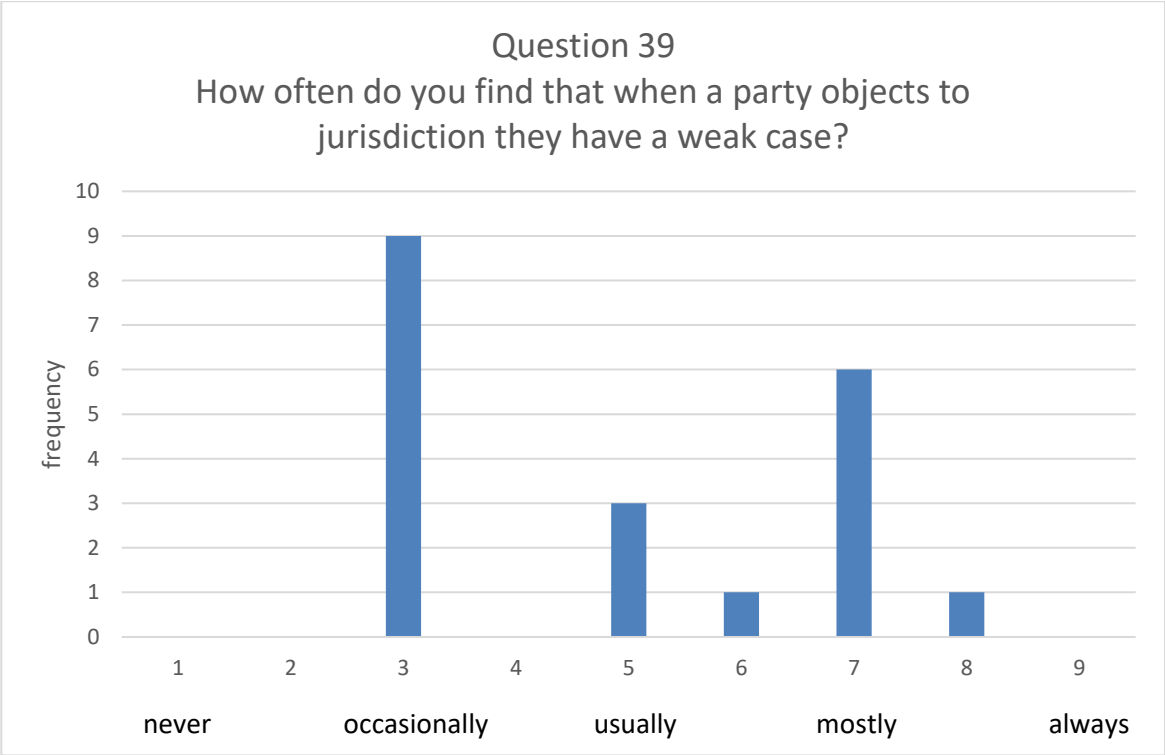

Figure 6.39 How often do you find that when a party objects to jurisdiction they have a weak case?

6.4.39 Findings

Mean response: 4.9

Standard deviation: 1.87

The results of the sample suggest albeit sometimes only occasionally, those parties that do object to jurisdiction, on the balance of probabilities are more likely than not to have a weak case.

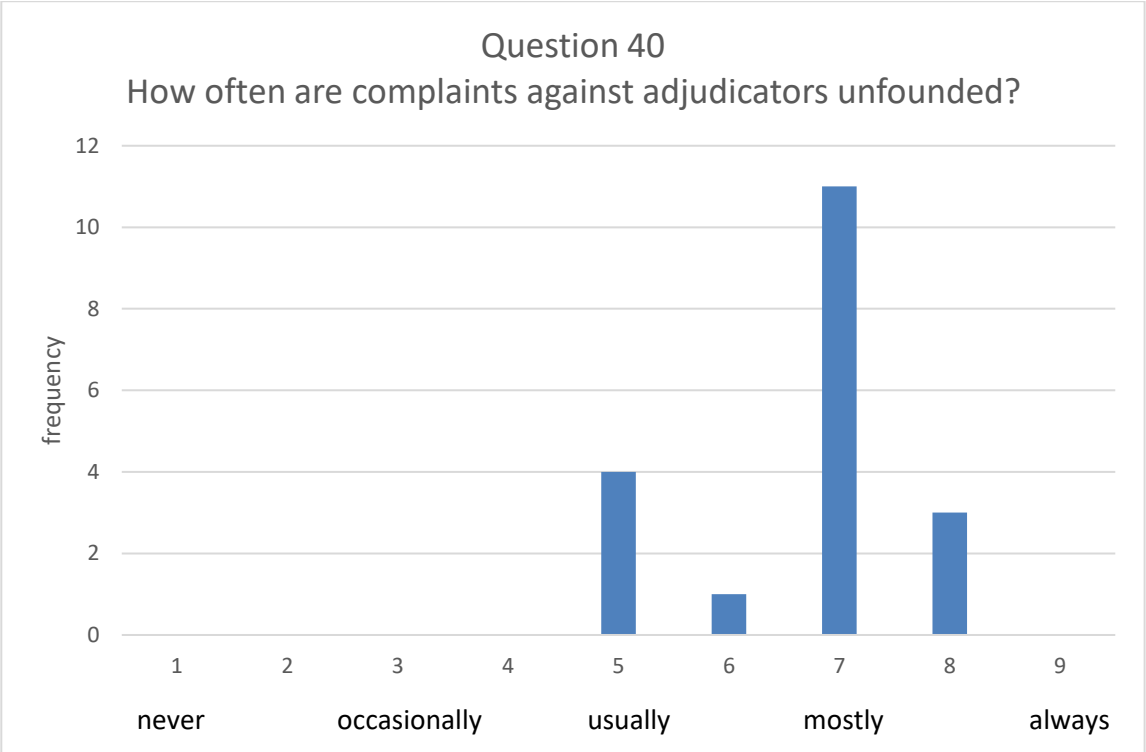

Figure 6.40 How often are complaints against adjudicators unfounded?

6.4.40 Findings

Mean response: 6.7

Standard deviation: 0.98

The results of the sample largely suggest, with little variation, that complaints against adjudicators are unfounded. Perhaps the sample display some bias as they are adjudicators. However, it does suggest that such complaints are likely a waste of valuable party resources.

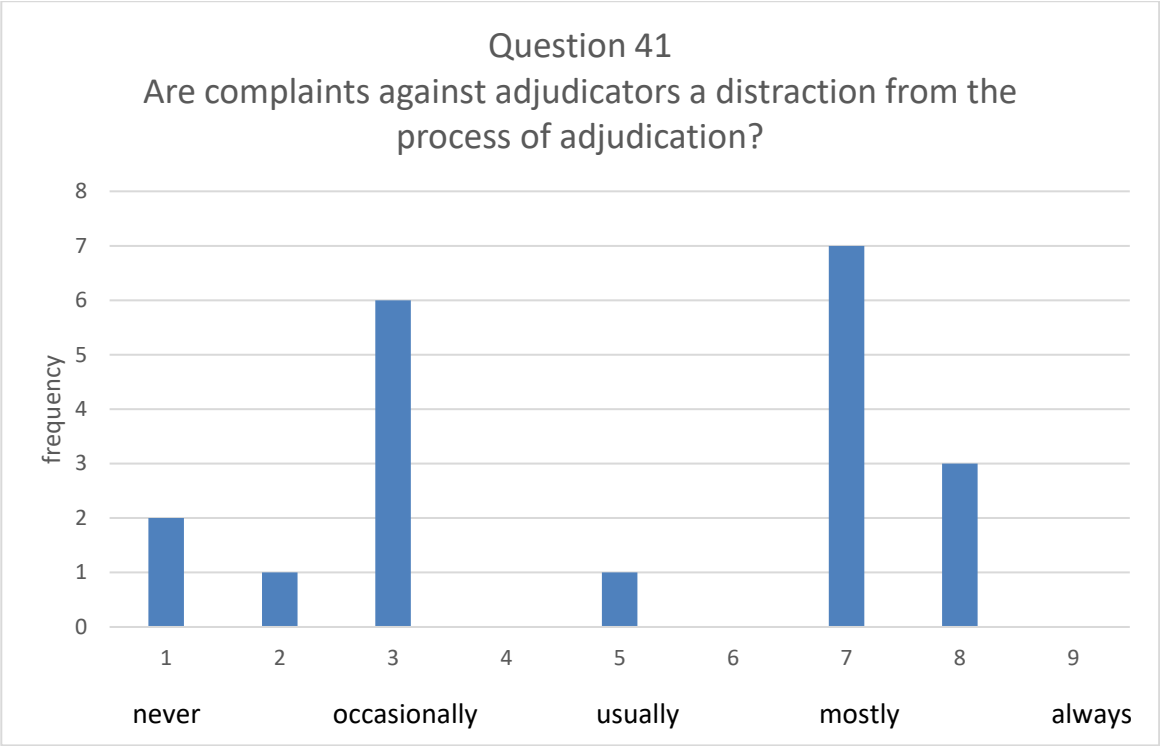

Figure 6.41 Are complaints against adjudicators a distraction from the process of adjudication?

6.4.41 Findings

Mean response: 5.0

Standard deviation: 2.45

This question created much greater deviation than question 40, albeit the sample results suggest that complaints against adjudicators are largely, albeit on a varying degree of regularity, a distraction from the process of adjudication.

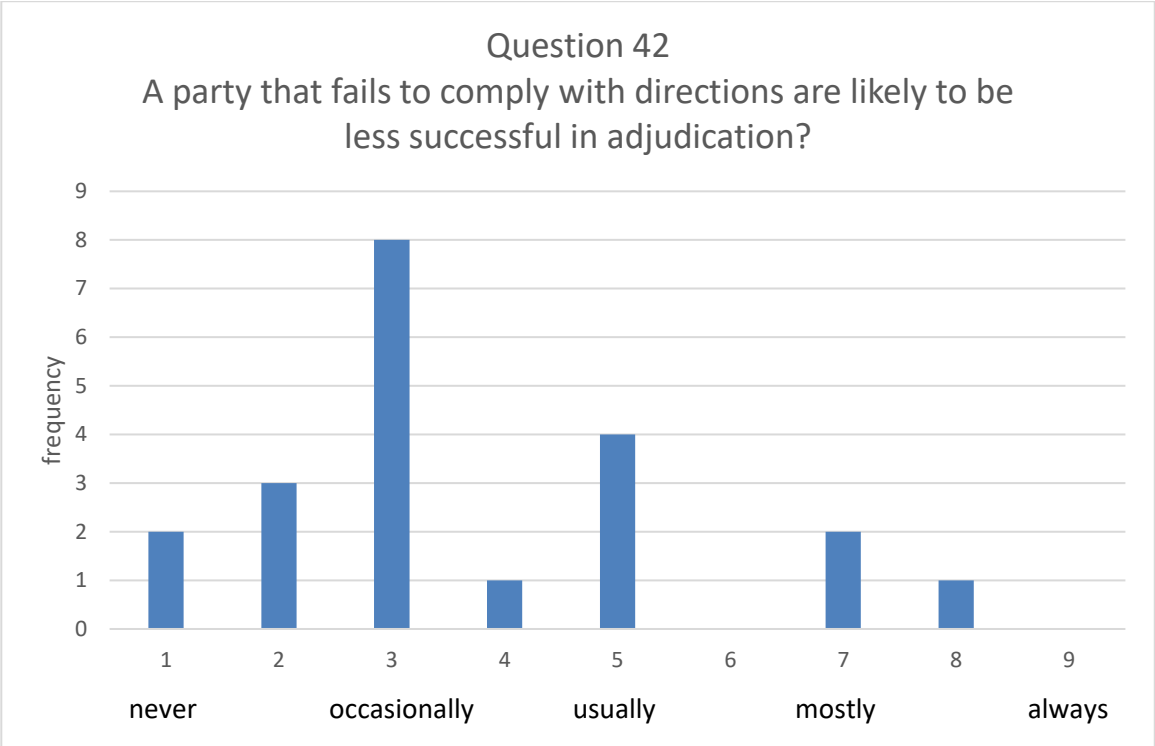

Figure 6.42 A party that fails to comply with directions are likely to be less successful in adjudication?

6.4.42 Findings

Mean response: 3.7

Standard deviation: 1.88

The sample results are unclear as to whether a party that fails to comply with directions are likely to be less successful in adjudication. Plainly some adjudicators consider that that is likely to be the case but others say rarely. It will be interesting to see how this fairs by reference to previously decided disputes.

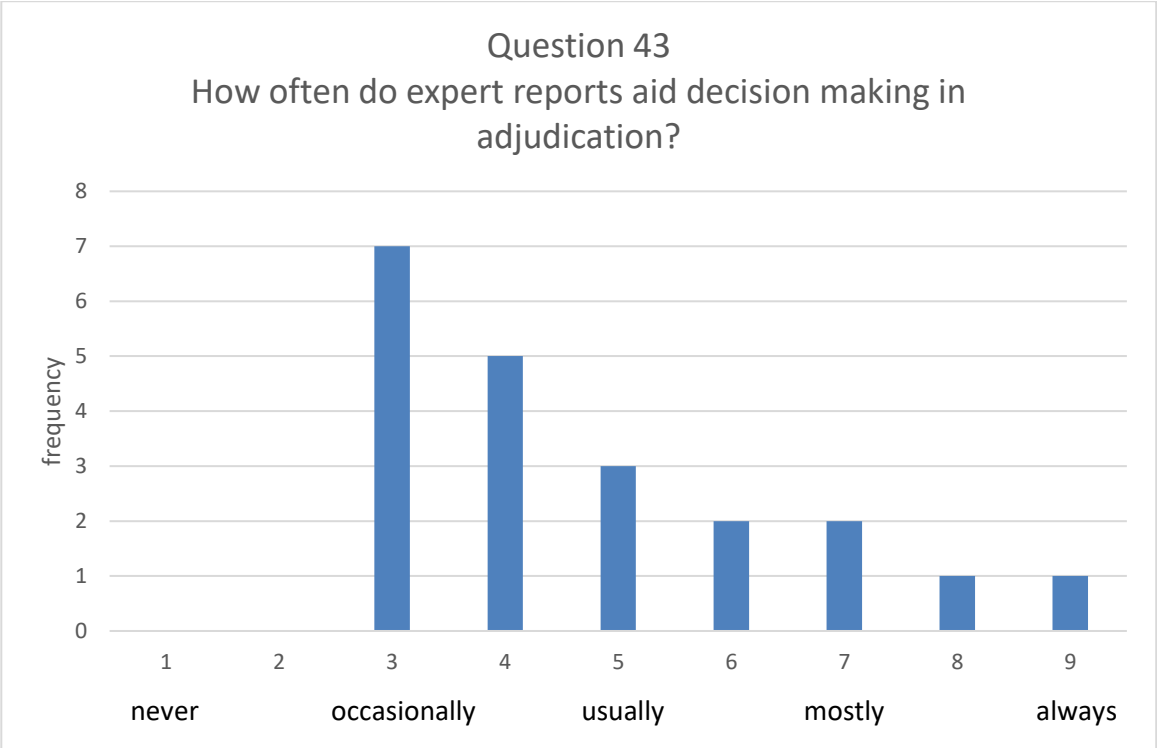

Figure 6.43 How often do expert reports aid decision-making in adjudication?

6.4.43 Findings

Mean response: 4.7

Standard deviation: 1.78

The sample results, whilst not conclusive, suggest that expert reports do assist decision-making in adjudication. This suggests that a party to an adjudication would probably benefit from the inclusion of an expert report in their submissions.

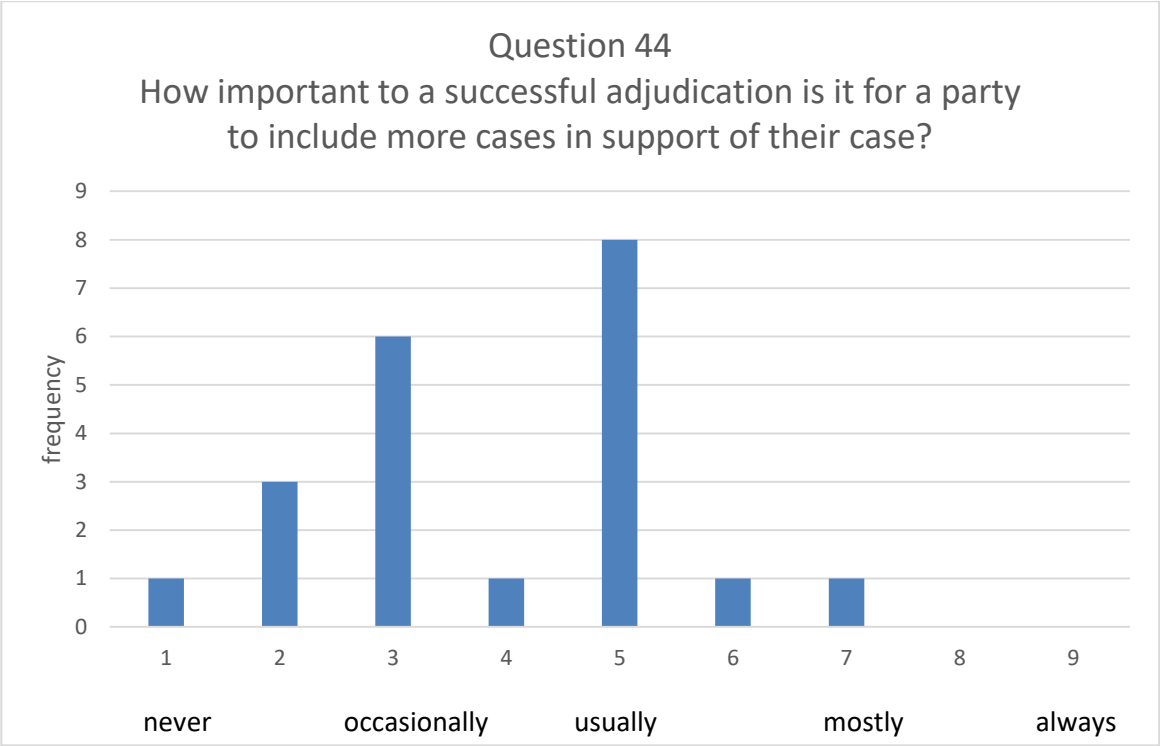

Figure 6.44 How important to a successful adjudication is it for a party to include more cases in support of their case?

6.4.44 Findings

Mean response: 3.9

Standard deviation: 1.51

The sample results suggest that more cases in support of a case can be beneficial, however the results are not conclusive and some of the sample suggest that the number of cases is much less important. It will be interesting to see how this potential factor fairs in relation to previously made decisions, if included in a model..

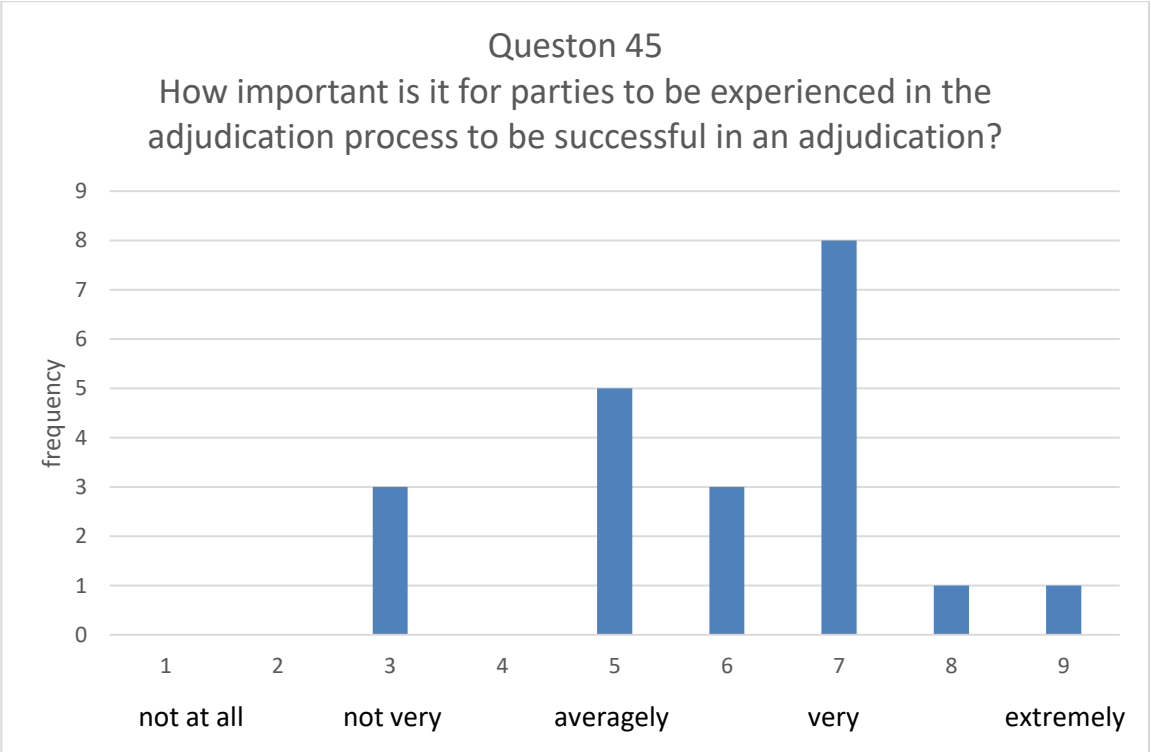

Figure 6.45 How important is it for parties to be experienced in the adjudication process to be successful in an adjudication?

6.4.45 Findings

Mean response: 6.00

Standard deviation: 1.59

The sample results suggest that generally more experienced parties are more likely to be successful in an adjudication.

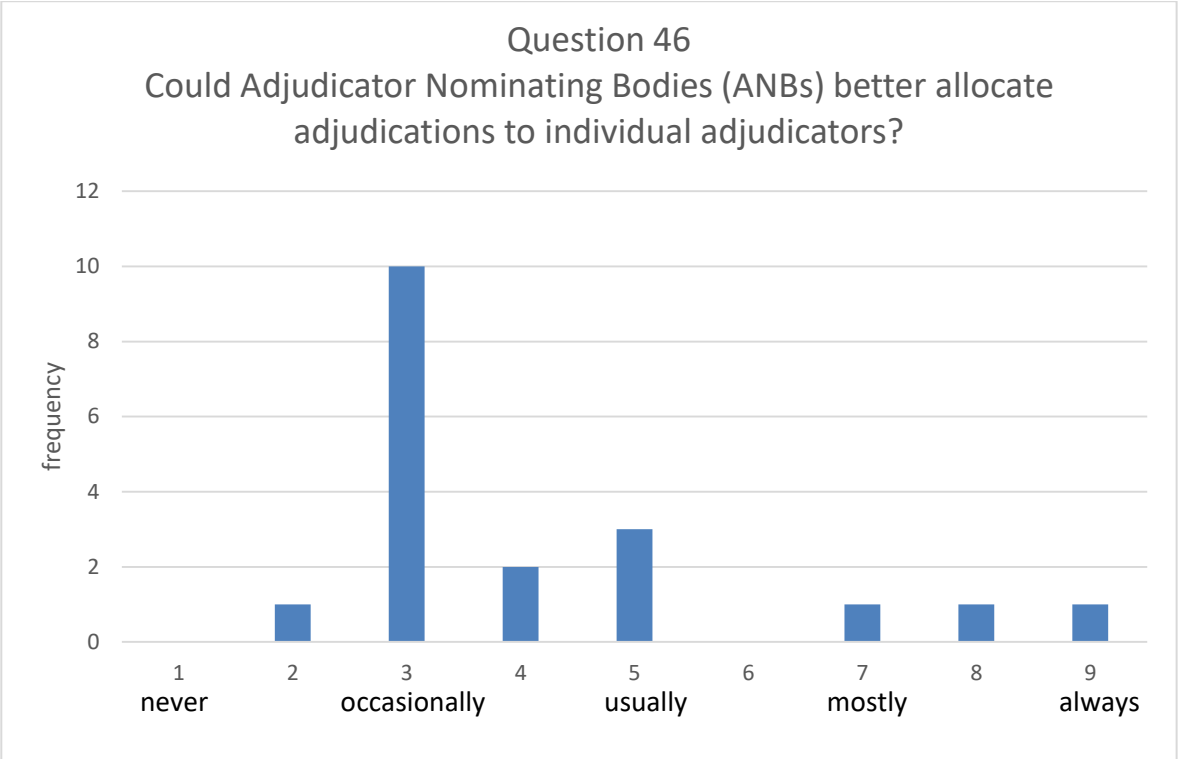

Figure 6.46 Could Adjudicator Nominating Bodies (ANBs) better allocate adjudications to individual adjudicators?

6.4.46 Findings

Mean response: 4.2

Standard deviation: 1.87

The sample results suggest that Adjudicator Nominating Bodies are not always the best at allocating disputes to adjudicators, which might result in the optimum adjudicator for a given dispute not being nominated.

Figure 6.47 Is it your experience that an adjudicator can be too busy?

6.4.47 Findings

Mean response: 3.1

Standard deviation: 0.77

The sample results generally suggest that occasionally an adjudicator may be too busy. This will likely impact the amount of time he/she can spend on determining a dispute.

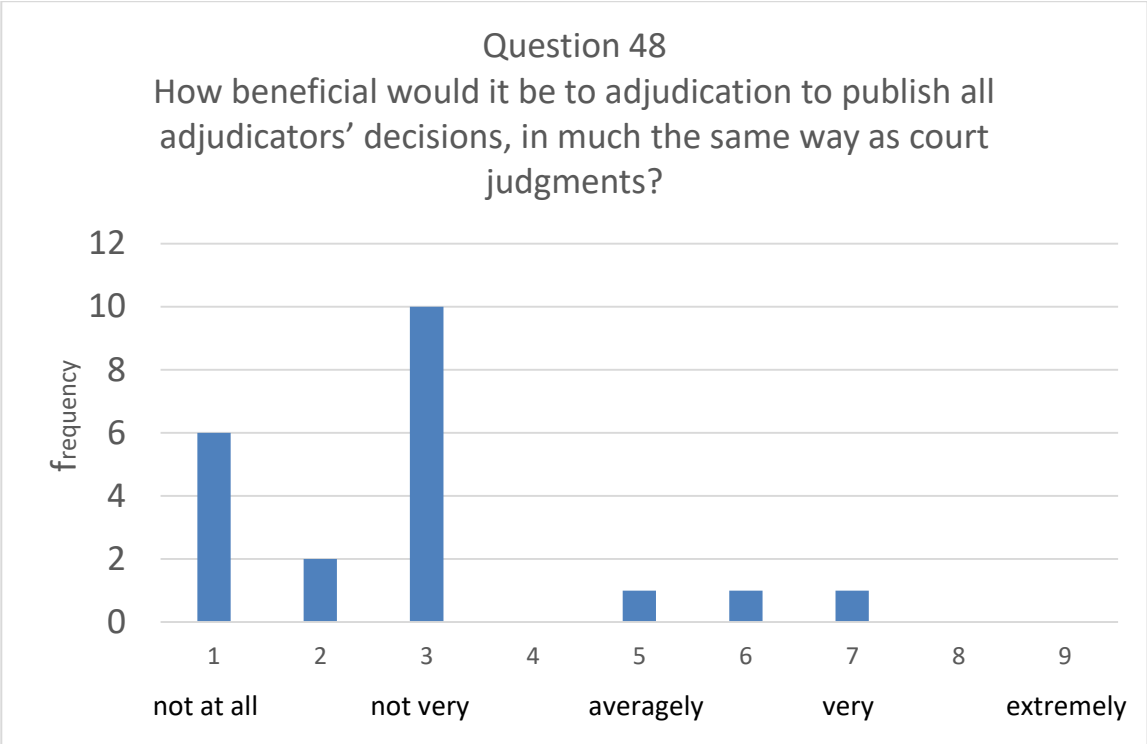

Figure 6.48 How beneficial would it be to adjudication to publish all adjudicators' decisions, in much the same way as court judgments?

6.4.48 Findings

Mean response: 2.8

Standard deviation: 1.60

The sample results generally suggest that the sample sees little or no benefit in the publication of adjudicator's decisions. That may be indicative of risk aversion in relation to the public display of decisions.

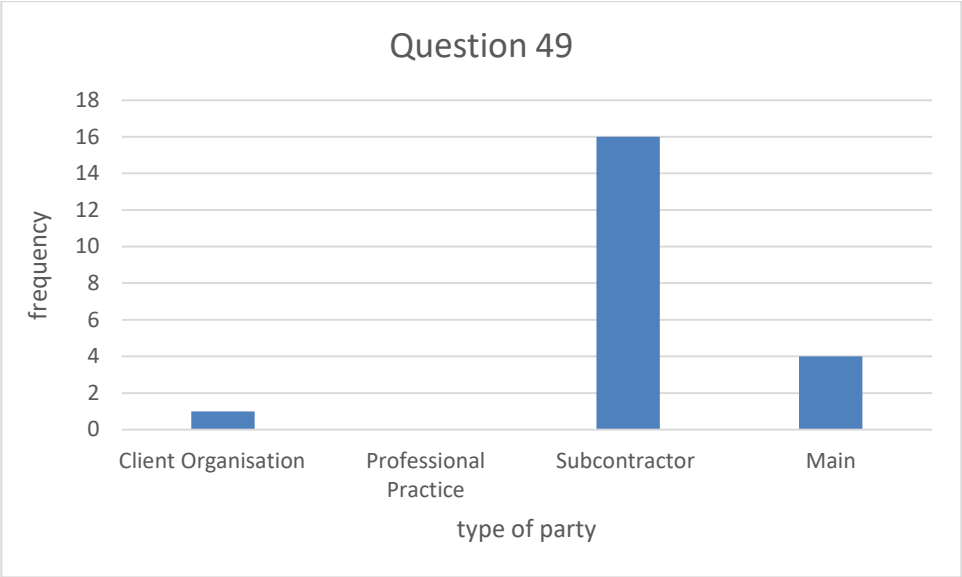

Figure 6.49 On balance which type of party do you consider benefits most from adjudication?

6.4.49 Findings

The sample results suggest that adjudication benefits those that the legislation was largely introduced to assist – subcontractors the most – which leads one to consider that the legislators were successful in that regard.

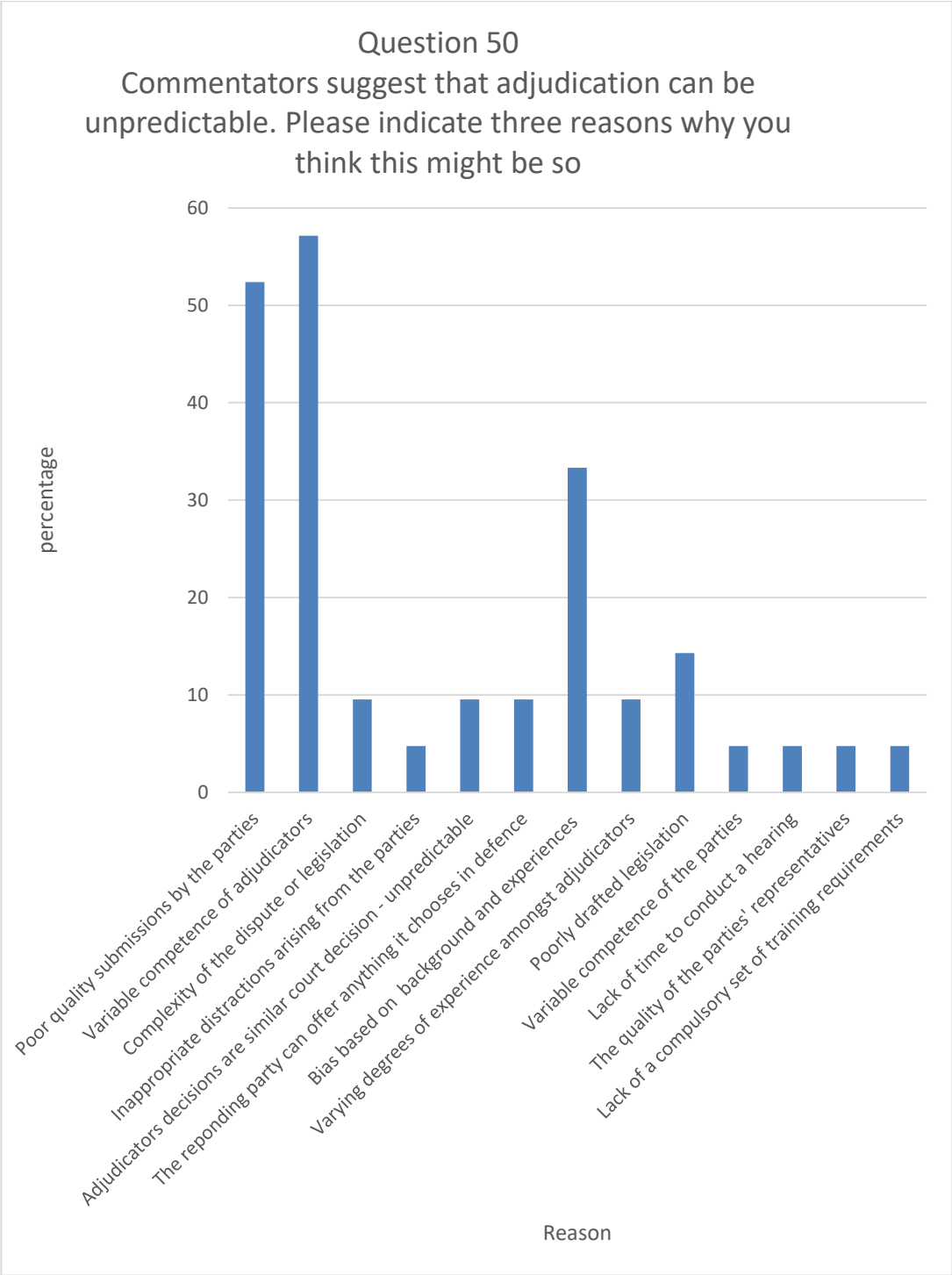

Figure 6.50 Commentators suggest that adjudication can be unpredictable. Please indicate three reasons why you think this might be so.

6.4.50 Findings

This question produced some consistent answers from the sample. The sample considered that the main reasons adjudication can be unpredictable are:

1. Variable competence of adjudicators – this was the most common reply; in excess of 50% of the sample considered this to be a reason why adjudication is said to be unpredictable.

2. Poor quality submissions by the parties – this was the second most common reply; again in excess of 50% of the sample considered this to be a reason why adjudication is said to be unpredictable.

3. Bias based on background or experience – this was the third most common reply; in excess of 30% of the sample considered this to be a reason why adjudication is said to be unpredictable.

7 IDENTIFY THE FACTORS IN THE PROCESS

7.1 FACTORS THAT MIGHT INFLUENCE THE DECISION OF AN ADJUDICATOR

This chapter analyses the process of Adjudication and identifies the factors that influence the decisions made by adjudicators.

7.2 INTRODUCTION

Learned writers who are also practising adjudicators suggest that decision-making by adjudicators is a straightforward process. One such study by Riches and Dancaster (2004:243) summarised this in the following terms; decisions by adjudicators *'all boil down to a simple process. That process is as follows:*

> *'We sort out the facts that have a bearing upon the decision we have to make;*
>
> *We consider the influences that will also have a bearing;*
>
> *We look at the alternatives; and*
>
> *We choose the appropriate one in the light of all the circumstances applying at that particular time*

Decision-making as an adjudicator in respect of a dispute, however complex it may be, is little different from that…' (Riches and Dancaster, 2004:243).

This clearly shows that adjudicators are aware of, and do consider, the influences that have a bearing upon their decision. However, the writers did not identify the specific influences. It also shows that adjudication decisions follow a typical structured decision-making process. However, Molloy (2013), a practising adjudicator, considers that the process of decision-making undertaken by an adjudicator is much more complicated; he concluded that adjudicators' decisions are unpredictable and probably always will be.

7.3 IDENTIFYING FACTORS THAT MIGHT INFLUENCE AN ADJUDICATOR IN DECISION-MAKING

The research indicated that in Statutory Adjudication, the potential factors fall into four main categories related to:

(a) The process of Statutory Adjudication;
(b) The person – the decision maker;
(c) The dispute; and
(d) The parties or their representatives.

The potential factors are explored below.

7.4 CATEGORY A. THE PROCESS

7.4.1 Factor A1. The Notice of Adjudication

The process of Statutory Adjudication commences with the serving of a Notice of Adjudication; the quality of this has an influence on the adjudication, the adjudicator and how they perceive, and ultimately adjudicate, the dispute.

Numerous dispute specific scenarios related to the Notice being defective show that it is potentially likely to impact the predictability of a decision, albeit as yet there has not been any formal research on this issue. This research will seek to establish whether a defective Notice renders a party to be more or less successful in an adjudication and is therefore a contributing factor to the predictability of the adjudication.

7.4.2 Factor A2. Appointment of the Adjudicator

The selection of the Adjudicator will have an influence on the predictability of the decision.

The legislation requires that following the Notice of Adjudication the referring party should either:

1) Notify any named adjudicator in the Contract that there is a dispute and send him/her a copy of the Notice and request that he/she decides the dispute; or
2) Apply to an Adjudicator Nominating Body to nominate an adjudicator.

The influence resulting from the way in which the adjudicator is appointed varies. According to anecdotal evidence from industry professionals and practising adjudicators, if the adjudicator is named in the contract they may feel grateful to both parties and therefore ensure that each party recovers something, or that neither party recovers nothing. Perhaps then, an adjudicator will continue to be named and receive further appointments. It is foreseeable that naming (or agreeing) this might impact upon the predictability of a decision and therefore it will be a factor tested by this research project.

Alternatively, if an Adjudicator Nominating Body makes the appointment there is greater uncertainty as it is likely that the Adjudicator is unknown and therefore their decision less predictable. This unpredictability might be compounded by which of the nominating bodies is used to make the selection. For example, an application to the Royal Institution of Chartered Surveyors (RICS) may tend to result in the appointment of an adjudicator who is more inclined towards the clients, whereas an application to the Chartered institute of Building (CIOB) may tend to result in the appointment of an adjudicator who is more empathetic to a main contractor or subcontractor.

There has been considerable debate as to whether a selective approach to nomination favours one party or the other. In some instances, a party specifically requests a specific adjudicator or a nomination from a small group of adjudicators; if that is the case does a party tend to be more or less successful? Conversely, some parties seek to specifically exclude some adjudicators; if that is the case does a party tend to be more of less successful in the dispute decided by an adjudicator that they did not exclude?

A further point to consider is that the referring party selects the Adjudicator Nominating Body at the time of the nomination request (assuming one is not selected by the parties within the Contract). This would appear to be of advantage to the referring party, as they will likely select an Adjudicator Nominating Body best skilled in the subject of the dispute, for example the RICS for quantum matters. The referring party might also select a nominating body not related to the responding party. For example if a main contractor is in dispute with an architect, the contractor might not want to select the

RIBA. This research will consider whether being able to select the nominating body impacts upon the predictability of an adjudicator's decision.

7.4.3 Factor A3. Challenging Jurisdiction of the Adjudicator

In some instances, once an adjudicator has been appointed, a party may seek to challenge his/her jurisdiction, requesting that he/she resign. An adjudicator might well view such a challenge negatively, particularly if he/she considers the challenge unfounded and decides to continue with the adjudication. This research will consider the impact that such objections to jurisdiction might have upon predictability of a decision.

7.4.4 Factor A4. The Referral Notice

It is foreseeable that a defective Referral Notice will impact negatively on an adjudicator, as that party is unlikely to be clear about what their case actually is and the adjudicator may have more sympathy with the responding party as a result, albeit this has not yet been formally tested. It is generally possible to see observations in decisions that indicate the quality of the Referral Notice therefore this factor will be tested to establish its impact upon the predictability of a decision.

7.4.5 Factor A5. Compliance with Directions

There is speculation in industry that a party that is not compliant or complies belatedly with Directions is likely to be less successful in an adjudication. The process of Statutory Adjudication requires the adjudicator to issue Directions, essentially what will be done, by when and by whom. In some instances, parties do not comply or comply belatedly with Directions. The matter of compliance or otherwise with Directions can usually be found in the decision. This research will seek to test such speculation in order to establish whether compliance with Directions influences the predictability of the adjudicator's decision.

7.4.6 Factor A6. The Response

The quality of the Response is likely to impact upon the decision and by implication the predictability of that decision. The Response is a very important document for the responding party; it is their opportunity to put their defence and any counterclaim to the adjudicator. Indeed, it might be their only opportunity. The timescale for a Response is usually in the order

of 7 – 10 days (the adjudicator directs timing) and therefore the responding party must be efficient. Entwistle (2012) as an adjudicator identifies that Responses can be poorly drafted. The responding party should appreciate that a poorly drafted Response will likely impact upon the adjudicator's decision. The quality of the Response can often be deduced from the Decision by reference to the adjudicator's comments or reasons. The quality of the Response is likely to impact upon the success or otherwise, of the responding party. This research project will seek to test the impact of the quality of the Response on the predictability of the adjudicator's decision.

Timescales for the Response are also likely to impact predictability. This is considered in the relevant section below.

7.4.7 Factor A7. Referring Party's Reply

There is no automatic right to a Reply to the Response. However, in practice adjudicators often permit them. The Reply can be helpful if the Response raises new points or matters not previously argued. However, other commentators suggest that a Reply adds very little and often only restates the position in the Referral. That in turn, given the adjudicator is bound to read the Reply, detracts from the time that he/she has to reach his/her decision. This research will consider whether a party issuing a Reply impacts upon the predictability of a decision.

7.4.8 Factor A8. Rejoinder

Again, there is no automatic right to respond to the Reply. However, this is often done by way of a Rejoinder. Some commentators suggest that a Rejoinder adds very little and being so late in the process detracts from the time available for the adjudicator to reach his/her decision. Others suggest that a Rejoinder is beneficial as it reinforces the case and it is as well for that party to have the last word so to speak. This research will consider the impact of a Rejoinder upon predictability of the decision.

7.4.9 Factor A9. Timescales Associated with the Process

If the timetable is un-amended, the adjudicator must reach a decision within 28 days. The process provides for a tight timescale. If time is extended that is likely to be a factor in terms of predictability. This is considered further in the section below.

A number of commentators and colleagues suggest that the timescales involved in Statutory Adjudication are likely to have some impact upon the decisions reached by adjudicators.

It has been said that 'Adjudication is a tricky business. The timescales involved makes this almost inevitable.' (Riches and Dancaster, 2004:18).

The legislation directs a short timescale for Statutory Adjudication; Section 108(c) of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) *'requires the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred:*

(e) to allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred.'

Some commentators such as Entwistle (2012) suggest that there is an imbalance of power insomuch that only the referring party is able to extend time by 14 days. That is to say that the responding party cannot extend time acting alone. That, one might suggest, puts the responding party at a disadvantage, particularly given that the referring party could have had unrestricted time to prepare the Referral Notice in the first instance. This raises some interesting questions as to predictability such as:

1) If a responding party has to issue a Response within 7 days how often are they successful or not?
2) If the responding party has 14 days are they likely to be more successful?
3) If the referring party grants an extension of time, which party is likely to benefit most?
4) If the parties jointly agree an extension of time, which party is likely to benefit most?
5) If the adjudicator is given more than 42 days to decide, which party is likely to benefit the most?

Kirkham (2004) challenged the time-based rationale and considered that not all disputes are suitable for timely adjudication. He concluded that *'the parties will have an answer. But they may not have the right answer.'* Which would suggest that adjudication might be unpredictable.

Notwithstanding Franklin (2005) noted that only 60% of adjudications were being decided within 28 days and 10% were taking longer than 42 days. Franklin concluded that adjudications were taking longer.

Research by Bowes (2007) was inconclusive as to whether adjudications were taking longer. Bowes asked participants in adjudication including some adjudicators for their views. One adjudicator considered that 80% of his decisions were finished within 42 days and another stated that he had never been in adjudication that lasted 42 days and that 28 days was the norm.

The limited time placed upon the dispute resolution process can be further impacted by the volume and timing of submissions by the parties. The practical consequence is that an adjudicator may only have hours to decide the dispute after the last submission. One might suggest that a decision made in such a short time frame is likely to be less predictable.

However, time is likely to have more of a bearing and can be measured from previous decisions. Might it be the case that decisions that are reached within 28 days are more or less predictable? Some argue that 28 days is enough time to decide any dispute, others say that is incorrect and renders the process unpredictable. If time is extended, is one party more likely to be successful or not? If a referring party refuses to extend time by 14 days, does that impact the outcome? Or can the impact be predicted? Does the time taken to reach a decision make it more or less predictable or does this have no discernible influence?

This research will explore these possibilities by reference to previous decisions reached by adjudicators.

7.5 CATEGORY B. THE DECISION MAKER

7.5.1 Factor B0. Quality of the Adjudicator

The quality of the Adjudicator will have an influence on the decision made, but whether the influence is consistent and predictable is a different matter.

The Report by the Construction Industry Board reported to the Construction Minister in December 2000 stated that *'Clients report anecdotal concerns about the quality of adjudicators, many of whom are of course named or agreed in the contract rather than appointed by ANBs.'*

Experienced adjudicators concurred stating *'...that the quality of performance of some of the adjudicators was inadequate.'* (Riches and Dancaster, 2004:5).

However, in 2005, an experienced construction lawyer commented that *'Once you are in an adjudication, it is important to appreciate that the procedure and the outcome can be unpredictable. The quality of the adjudicators can be variable and there are often widely different approaches adopted depending upon the professional background of the adjudicator.'* (Randle, 2005).

In 2008 The Centre for Effective Dispute Resolution, an organisation responsible for the nominating of adjudicators announced the overhauling of its structure *'in an attempt to improve the quality and speed of adjudication decisions.'* They reduced their panel of adjudicators from 50 to 32 to include only the '*best known and respected adjudicators.'* This accordingly reduced the number of adjudicators and might suggest that the decisions of a few individuals are likely to be more predictable.

It is interesting to note that the Adjudication Reporting Centre kept records of complaints made against adjudicators appointed by ANBs; it is reported that the number of complaints made is generally between 1 and 2% but very few are upheld, that is to say that less than half a percent. Report No. 10 concludes that *'There is still a very low level of complaints against adjudicators…This must reflect well on the professionalism of the adjudicators themselves and of the ANBs which manage the process on behalf of the industry.'* (Kennedy and Milligan, 2010).

Kennedy and Milligan (2010) observe that many Adjudicator Nominating Bodies have taken on board many of the criticisms of adjudicators and reduced the number of adjudicators registered with them. There is said to be much more rigorous selection and reappointment criteria, which has led to the best adjudicators being retained.

Bingham (2011) by contrast is very critical of the quality of some adjudicators. He stated that *'Too many adjudicators are out of touch and, frankly, incompetent…'* He further states that *'To be blunt, there are an awful lot of adjudicators who have passed their sell-by-date, are out of date, haven't kept up. Worse, they don't even know how incompetent they are.'*

The construction lawyers, Pinsent Masons (2016) report that *'The quality and competence of adjudicators varies tremendously, and there is always the risk that the person nominated may not be competent technically or otherwise, to deal with the matter referred.'*

This would appear to be a problem that has existed since the commencement of Statutory Adjudication. Whilst some action has been taken by Adjudicator Nominating Bodies the perception remains that the quality of adjudicators is variable and this will likely contribute to the unpredictable nature of the matter. It is possible that it is key. From previous decisions, it is possible to get a sense of the quality of the decision, which in turn must relate to the adjudicator, but it is not likely to be conclusive.

7.5.2 Factor B1. The Professional Background of the Adjudicator

Whilst previous work concerning arbitration (Ossman *et al,* 2009) concluded that the professional background of the decision maker did not impact the predictability of a determination many commentators suggest in regard to adjudication that the professional background of an adjudicator will, even if unconsciously, impact an adjudicator in his/her decision-making. That, Bingham (2005) contends is inevitable. This research will seek to test whether if an adjudicator's professional background is closer to that of one of the parties it will impact the predictability of the decision.

7.5.3 Factor B2. Does it Impact Predictability if the Adjudicator is Legally Qualified?

The Adjudication Reporting Centre report that lawyers are becoming more prevalent as adjudicators (refer report No 10).

The report shows there is an increase in the number of lawyers becoming adjudicators. The issue as to whether lawyers are potentially better adjudicators has been debated in the construction industry by commentators.

A lawyer, Minogue (2011) suggests that legally qualified adjudicators might be better placed to adjudicate.

Molloy (2011) also legally qualified, suggests that whether or not the adjudicator is legally qualified has little bearing on his/her decision-making.

It is not currently clear whether legally qualified adjudicators make better or more predictable decisions.

This research will consider whether the fact that an adjudicator is legally qualified impacts upon the predictability of an adjudicator's decision.

7.5.4 Factor B3. Proactive v Passive Approach

The approach taken by the adjudicator has an influence on the predictability of the decisions that they make.

The adjudicator is generally free to choose to be either proactive or passive in his/her approach to deciding the dispute (Aeberli, 2005). If an adjudicator chooses to be passive, he/she will rely only upon the parties' submissions. He/ahe will not raise significant queries or additional questions etc. Some suggest that that is the correct approach as it is for the parties to properly establish and demonstrate their respective cases. Anecdotally commentators suggest that the passive approach favours the referring party as they have not been restricted in the time available to prepare their Referral and the responding party is necessarily limited in time in preparing the Response.

By contrast, commentators suggest that the proactive approach might benefit the responding party as in consequence of limited time they might not properly support or explain their case in the first instance. It is also mooted that a proactive approach might expose weaknesses in a referring party's case.

Crawford (2014) widens the proactive v passive debate by giving a view from a party representative technical prospective. Crawford considers that:

> *'... I find that this process can vary according to the discipline of the adjudicator. I may be on controversial ground here but my experience is that engineers and quantity surveyors handle things quite differently. Setting aside how each of them deal with jurisdiction matters, which is similar, I find that engineers are, from the outset, much more proactive in the process. They ask a great many questions and they can commence asking questions after receipt of the Referral.'*

Plainly, Crawford consider engineers proactive in her experience. Crawford went on to say:

> *'In contrast, I find quantity surveying adjudicators bide their time. They tend to wait for submissions from both parties before their enquiring of parties begins.'*

Whilst Crawford does not say that quantity surveyors are passive, she would appear to suggest that they are not as proactive as engineers are.

None of above submissions have been tested by structured research. It is generally possible to see what approach was adopted by an adjudicator in determining the dispute by reference to the decision. In turn, it will be possible to establish whether the approach chosen by the adjudicator, passive or proactive, is a factor that impacts upon predictability of the decision.

7.5.5 Factor B4. Unconscious Bias

Bingham (2005), as an arbitrator and an adjudicator, stated that *'Arbitrators, adjudicators and even judges, all have unconscious bias, you can't change that – but you can make sure that you don't help them to direct it against you.'* Bingham (2005) conveys that he and a fellow adjudicator had discussed the matter and in particular, his fellow adjudicator considered that a main contractor involved in a previous matter, some fifteen years before had given cause for the adjudicator to consider that main contractors were less than trustworthy. The adjudicator had stereo typed main contractors unwittingly and was biased unintentionally or unconsciously. Bingham considered that *'If you lose your reputation in the middle of an adjudication, or if you are simply stereotyped by the decision maker, you are in trouble – irrespective of the rights and wrongs of your case. The tribunal will not even realise that it is being unfair to you.'* Bingham considers that judges and arbitrators do not stand aloof as entirely impartial and objective; that is not possible and the further down *'the hierarchical chain of decision makers, the less practised you'll find those decision makers are at being objective.'* This would include adjudicators. Whilst potentially a factor in terms of predictability, this cannot easily be tested by reference to previously made decisions.

7.5.6 Factor B5. The potential for 'Customer Building'

However and directly relevant to this research project, Bingham returns to the debate in 2011 and widens the scope; he asks that whilst adjudicators promise to be impartial, can they be unknowingly biased towards one side?

Bingham makes his point by reference to examples. Bingham suggests scenarios such as an adjudicator that also undertakes expert witness work. Might that adjudicator be unconsciously biased towards a firm of solicitors

that do or likely would give him work as an expert? Bingham uses the term '*Customer Building'*. Bingham concludes that this is difficult territory but implies that unconscious bias will very likely exist and relates directly to the possibility for an adjudicator to engage in potential for customer building (Bingham 2011a).

Borrowing from the work of Bingham (2011a) it is foreseeable that the same customer building arising from bias might exist with an adjudicator that is seeking more appointments as an adjudicator. For example, larger main contractors are likely to have a regular flow of adjudications and therefore an adjudicator might be mindful that he/she could secure more work if they were minded to consider him/her a good adjudicator, consequent of his/her decision.

Wakefield (2011) follows this point and indicates that some adjudicators prefer not to entirely dismiss or allow a party's claim. Rather they give something to each. He refers to *'...at least one adjudicator who is known in the legal fraternity as Mr 50%.'* This might support the customer building/unconscious bias point, but it is difficult to be certain.

It will not be possible to test for unconscious bias from previously made decisions. However, it will be possible to see whether and to what extent parties are successful or not, given their respective anticipated balance of power (main contractor/subcontractor etc.) and in consequence their likely involvement in further adjudication. From this one can see who an adjudicator might customer build towards. It will be interesting to see if such a factor impacts upon predictability of decisions across a sample of previous decisions.

7.6 CATEGORY C. THE DISPUTE

7.6.1 Factor C1. The Complexity of the Matter - Complex and Simple disputes

In 2006 a well-regarded construction lawyer stated that *'In recent years there have been some rumblings of dissent amongst certain members of the judiciary who are concerned as to the suitability of adjudication for all types of disputes such as professional negligence and complex final account disputes involving significant sums. To date these concerns have very much fallen on*

deaf ears and increasingly the scope of adjudication continues to embrace all manner of disputes that arise in the industry.

Accordingly, today we have a situation where the industry itself chooses to refer highly complex disputes involving millions of pounds to adjudication at a time when the courts have made it clear that enforcement will only be declined in exceptional cases.' (Francis, 2006).

7.6.2 Complex Disputes

It is clear that some highly complex disputes have made their way into adjudication. Coulson J in William Verry Limited v. Furlong Homes Limited [2005] CILL 2205 described these types of disputes as *'kitchen sink adjudications'*. Such disputes will often involve a combination of matters that might include variations, valuation, extensions of time, loss and expense, defects and retention.

Whilst Coulson J did enforce the adjudicator's decision he also stated that '*A referring party should think very carefully before using the adjudication process to try and obtain some sort of perceived tactical advantage in final account negotiations and, in so doing, squeezing a wide ranging final account dispute into a procedure for which it is fundamentally unsuited.'* (Coulson, 2005).

Coulson also stated that *'Whilst such adjudications are not expressly prohibited by the Housing Grants, Construction and Regeneration Act 1996 as it presently stands, there is little doubt that composite and complex disputes such as this, cannot be accommodated within the summary procedure of adjudication.'*

Such disputes often involve significant sums of money and require the consideration of substantial documentation. The matters can be highly complex. In CIB Properties v. Birse Construction Limited [2005] BLR 173 it was such that CIB claimed over 14 Million Pounds and filed 49 files with the Referral Notice including 16 witness statements and a further 58 files were served during the adjudication. CIB were awarded over two million pounds by the adjudicator. Birse attempted to resist enforcement, one reason being that they considered that the size and complexity of the dispute meant that it could not be resolved fairly through adjudication.

The Judge enforced the decision, deciding that the test is not whether the dispute is too complicated, but whether an adjudicator is able to reach a fair decision within the time limits allowed by the parties. Here, to reach a fair decision, more than 42 days were needed and the adjudicator sought and obtained the agreement of the parties to extensions of time. This enabled him to reach a decision, having given both parties proper opportunities to put their case (Francis, 2006).

Davis (2005) suggests that the aforementioned case was correctly decided as the Housing Grants, Construction and Regeneration Act 1996 provides that 'any' dispute can be referred to adjudication. Davis also questions whether attempting to change this might create further problems for the process of adjudication.

Bingham (2006) commented that '*In most cases it is easy to decide even complex disputes in a short time, provided the parties have done all their quarrelling before calling in a referee…In real life, those complex disputes and difficult questions of law work beautifully in adjudication...'* However, it is perhaps important to note that the arguments or quarrels often continue throughout the process of adjudication.

In 2008 The Centre for Effective Dispute Resolution reduced its panel of adjudicators from 50 to 32. This was seen as a response to concerns that Adjudicator Nominating Bodies were selecting people who do not have enough experience of dealing with complex disputes.

At the end of 2009 the courts revisited complex disputes in Enterprise Managed Services Ltd v. Tony McFadden Utilities Ltd [2009] EWHC 3222. This was a complex and heavily documented dispute with more than 40 lever arch files presented by each party. The Court placed the burden on the adjudicator; it was for him to decide at the outset whether or not he can reach an impartial and fair decision within the time limit prescribed by the HGCRA. If he cannot, then the adjudicator ought to resign. In the Judgment Coulson concluded that *'The fact that, as a matter of practicality and fairness, this claim was not suitable for the summary adjudication process only supports my conclusion that the reference to adjudication was inappropriate as a matter of law.'*

Regardless, complex disputes have found their way in to adjudication on a continuing basis and they continue to do so. As Kennedy and Milligan (2010) say parties are referring more and more complex disputes such as claims for delay and disruption and still expect a decision in 28 days. Agapiou (2013) records that participants in his research indicated that the complexity of the dispute impacted upon whether or not the timescale was realistic. He indicated that the view of one of his sample was that being a responding party in a complex dispute with little time to respond was not a favourable position to be in.

Parties have chosen to refer complex disputes and nothing in the legislation restricts this.

This research project will consider whether the fact that a dispute is complex has an impact upon the predictability of the decision.

7.6.3 Simple Disputes

When Latham proposed adjudication in 1994, he anticipated that adjudication would be deployed to resolve relatively simple disputes during the currency of the project. A large percentage of disputes that are resolved by adjudication are still relatively simple in content. The Research Questionnaire revealed that adjudicators consider that adjudication is best suited to simple disputes. One might expect that decisions in regard to simple disputes might be more predictable, yet this has not been formally tested and further a large number of simple disputes are still adjudicated, suggesting that at least one of the parties could not predict the outcome before participating in an adjudication.

If a dispute is simple, this will be applied as a factor in order to seek to establish whether the fact that a dispute is simple impacts upon the predictability of the decision.

7.6.4 Factor C2. Verbal or Part Verbal Contracts

Since 2011 with enactment of the Local Democracy, Economic Development and Construction Act 2009, it has been possible to refer wholly verbal or part verbal contracts to adjudication. The need for a contract to be in writing was repealed. This foreseeably creates a significant evidential burden and one that the adjudicator would need to test in a short time frame (Entwistle, 2012). Might it be the case that disputes involving entirely verbal or part verbal

terms are much more difficult to predict? One might think so, but there has not been significant complaint from the industry, albeit this proposition has not been formally tested by structured research. This research will consider whether disputes arising from contracts that are wholly or partially verbal, that are referred to adjudication, are more or less predictable.

7.7 CATEGORY D. THE PARTIES OR THEIR REPRESENTATIVES.

7.7.1 Factor D1. The Quality of the Submissions by the Parties

Entwistle (2012), an adjudicator, is quite critical of the quality of submissions in adjudication and he notes that sometimes it appears that submissions have been hurriedly put together; he cites possible reasons as time pressures and commercial necessity, but concludes that such submissions are not likely to achieve the best result for a party in adjudication.

Entwistle (2012) concludes that it can be tiresome for an adjudicator to have to interpret what exactly a party is asserting or what remedies it seeks and why. He questions whether it should be for the adjudicator to be *'picking the bones out of an ill prepared submission.'*

Molloy (2012) acknowledges that parties' submissions are often lacking. He focuses on the Referral Notice and suggests that it should be carefully and clearly drafted. It would seem clear that the Referral Notice should set out the basis of the claim by reference to the contractual provisions. It should set out a factual chronology and be cross-referenced, to explain how the claim is supported. It should anticipate the defence and seek to deal with such arguments before they are included in the Response. It should clearly detail the redress sought and it should comply with the Scheme or contractual adjudication procedure. However, my experience and that of my office is that this is rarely done. There are often gaps that really should not be present in the Referral Notice.

The Court considered the quality of the submissions by the parties in Broughton Brickwork Ltd v. F Parkinson Ltd [2014] EWHC 4525 (QB) where despite the adjudicator finding in favour of Broughton in error, the Court considered that this arose from failings in Parkinson's submissions in the adjudication. Parkinson's submissions contained numerous errors and important

matters should have been clearly identified to the adjudicator and properly referenced. It was for Parkinson to bring such matters to the attention of the adjudicator and not for the adjudicator to search the submissions and find them.

The adjudicator erred in his decision and found in favour of Broughton as he had not considered an email contained in the submissions of Parkinson; if he had done so, he agreed he would have decided differently.

The Court considered that the cause of the adjudicator overlooking a crucial point and related evidence was errors and poor presentation by Parkinson. Parkinson had '*not drawn the existence or the importance of the document to the adjudicator's attention…'* The decision of the adjudicator was enforced. This serves to illustrate that party submissions can be poor and that the Court will expect the party to be responsible for the consequences of the same.

Commenting on this case Molloy (2015) stated *'It really goes without saying that time is short in adjudication. That is part of the rough and ready nature of the adjudication process. If you want the process to work in your favour, you have to do all that you can to help yourself and the adjudicator.'*

It is generally possible to tell from an adjudicator's decision if he/she is critical of submissions by a party.

This research will seek to establish to what extent the quality of submissions by the parties' impacts upon the predictability of the adjudicator's decision.

7.7.2 Factor D2. Expert Reports

The industry appears divided on the use of expert reports in adjudication. Some adjudicators suggest that such expert reports add significant value and yet others say they add little or nothing. The Research Questionnaire presented results that generally supported the use of expert reports. One might suggest that an adjudicator might not want to decide against expert opinion.

This research project seeks to establish whether having an expert report impacts upon the predictability of a decision.

7.7.3 Factor D3. The First and Last Word

In practical terms, there is a temptation for any party to a dispute to want to have the first or last word, or both. Whilst being the referring party has

benefit in terms of the first word and more time to prepare one's case, it is also argued that the referring party is more likely to be successful. Indeed research by the Adjudication Reporting Centre (refer report No. 10) supports such a submission. However, anecdotally adjudicators also suggest that some responding parties have remarkably good defence(s) and are perhaps quite well positioned in being second to submit. This research project will consider the impact of being the referring party and having the first word and whether having the last word impacts upon predictability of a decision.

7.7.4 Factor D4. Extent of Submissions

The legislation controlling adjudication originally envisaged that the Claimant would put its case in the Referral and the respondent would put its case and defence in the Response and that if necessary there would be a Reply to the Response for the Claimant. Some adjudications are conducted in that way. However, some have further submissions and that impacts significantly upon the time the adjudicator has to reach his/her decision. Molloy (2012) illustrates the point by explaining that a fellow adjudicator was left with just 12 hours to reach his decision after the final submission was made. Molloy explains that this happens all too often and sometimes 12 hours to reach a decision is a luxury.

Molloy (2012) questions whether actually any more than Referral and Response is all an adjudicator should see before reaching a decision. That might give sufficient time for reaching an informed decision.

This research project will consider whether further submissions have any impact upon the predictability of a decision. One school of thought suggests that the more evidence that is offered or repeated to support a case the more likely it is to succeed. Another school of thought is that having to consider further submissions is a distraction from decision-making and decisions that are made in a more limited timescale are likely to be unreliable and in turn will be unpredictable.

This research will consider whether further submissions impact upon the predictability of adjudicators' decisions.

7.7.5 Factor D5. The Selection of Party Representatives

A party to an adjudication is free to select by whom he/she wishes to be represented. Whilst it is rare, a party can chose to represent him or herself. Albeit, unless such a party is well versed in law and adjudication this is likely to be unwise. Commentators suggest anecdotally that parties that represent themselves tend to be less successful, albeit this has not been tested by structured research. This research will establish whether or not being represented impacts upon the predictability of a decision.

In contrast, some commentators argue representation by well-known construction lawyers improves the chances of success in adjudication. Perhaps unsurprisingly such commentators are often lawyers. This research project will establish whether being represented by well-known construction lawyers impacts upon the predictability of a decision.

Other practitioners suggest that being represented by well-known claims consultants is more beneficial than being represented by well-known construction lawyers as impliedly well-known claims consultants are more practical, whilst still having a good understanding of the relevant law. As an example, some commentators cite the fact that most construction lawyers have never worked on a construction project, while most claims consultants have.

Some practitioners suggest that if a party is represented by well-known lawyers or claims consultants then the published decision is likely to contain more detail. Anecdotally practitioners suggest that the decision will be deliberative and perhaps therefore more readily predictable. However, again this has not been formally tested by research. It is generally possible to determine whether the parties were represented and by who from a previously published adjudicator's decision.

This research project will establish whether not being represented or being represented by well-known construction lawyers or well-known claims consultants impacts upon the predictability of a decision.

7.8 CONCLUSION

This section identifies a number of factors that are likely to affect the predictability of an adjudicator's decision; such factors lend themselves to testing by a wide selection of questions as set out below:

7.8.1 The Process

7.8.2 Factor A1. The Notice of Adjudication

1. Does a defective Notice of Adjudication affect predictability of a Decision?
2. Does an objection to jurisdiction based upon a defective Notice of Adjudication affect the predictability of a Decision?

7.8.3 Factor A2. The Appointment of the Adjudicator

3. If an adjudicator is named in the Contract does that affect the predictability of a Decision?
4. Does having the right to select a particular Adjudicator Nominating Body affect the predictability of a Decision?
5. Does requesting a particular adjudicator or group of adjudicators affect the predictability of a Decision?
6. Does a party excluding adjudicators affect the predictability of a Decision from an adjudicator not excluded?

7.8.4 Factor A3. Challenging Jurisdiction of the Adjudicator

7. Does objecting to jurisdiction affect the predictability of a Decision?

7.8.5 Factor A4. The Referral Notice

8. Does a defective/poor quality Referral Notice affect the predictability of a Decision?

7.8.6 Factor A5. Compliance with Directions

9. Does compliance or non-compliance with Directions affect the predictability of a Decision?
10. Does belated compliance with Directions affect the predictability of a Decision?

7.8.7 Factor A6. The Response

11. Does a defective/poor quality Response affect the predictability of a Decision?

7.8.8 Factor A7. Referring Party's Reply

12. Does the issuing of a Reply affect the predictability of a Decision?

7.8.9 Factor A8. Rejoinder

13. Does the issuing of a Rejoinder affect the predictability of a Decision?

7.8.10 Factor A9. Timescales Associated with the Process

14. If the Responding Party has only 7 days to furnish a Response what affect does that have on the predictability of a Decision?
15. If the Referring Party grants an extension of time of 14 days, does that affect the predictability of a Decision?
16. If the Referring Party refuses to grant an extension of time, does that affect the predictability of a Decision?
17. If the parties jointly extend time, does that affect the predictability of a Decision?
18. Does the adjudicator having longer than 42 days to decide the dispute affect the predictability of a Decision?
19. Does rendering a Decision within 28 days affect the predictability of that Decision?

7.8.11 The Person

7.8.12 Factor B1. Professional background

20. Does having the same professional background as the adjudicator affect the predictability of a Decision?

7.8.13 Factor B2. Legally qualified adjudicators

21. Does the fact that the Decision maker is legally qualified (or not) affect the predictability of a Decision?

7.8.14 Factor B3. Proactive v Passive Approach

22. Does a proactive or passive approach affect the predictability of a Decision?

7.8.15 Factor B5. Potential for 'Customer Building'

23. Does potential 'customer building' to repeat adjudicator clients affect the predictability of a Decision?

7.8.16 The Dispute

7.8.17 Factor C1. The Complexity of the Dispute

24. In professional negligence disputes, does the profession of the adjudicator, being closer to that of a party, affect the predictability of the Decision?
25. Does the fact that a dispute is simple affect the predictability of a Decision?
26. Does the fact that a dispute is complex affect the predictability of a Decision?

7.8.18 Factor C2. Verbal or Part Verbal Disputes

27. Does the fact that a contract is verbal or part verbal affect the predictability of a Decision?

7.8.19 The Parties or their Representatives

7.8.20 Factor D1. The Quality of Submissions by the Parties

28. Does the fact that the adjudicator complained about the parties' submissions affect the predictability of a Decision?

7.8.21 Factor D2. Expert Reports

29. Does the furnishing of an expert report affect the predictability of a Decision?

7.8.22 Factor D3. The First and Last Word

30. Does the fact that a party referred the dispute affect the predictability of the Decision?
31. Does having the last word affect the predictability of a Decision?

7.8.23 Factor D4. The Extent of Submissions

32. Do further submissions by the parties affect the predictability of a Decision?

7.8.24 Factor D5. The Selection of Party Representatives

33. Does employing well-known construction lawyers affect the predictability of a Decision?
34. Does employing well-known claims consultants affect the predictability of a Decision?
35. Does a party choosing not to be represented affect the predictability of a Decision?

This research will seek to test such factors by application of an Explanatory Model and then Predictive Model. The above identified questions are utilised within both models.

8 OPERATIONALISE THE FACTORS TO DEVELOP AN EXPLANATORY MODEL

8.1 THE RATIONALE OF THE WEIGHTINGS APPLIED TO THE EXPLANATORY MODEL

The following sets out the justification for the weightings applied to the Explanatory Model. It follows the questions identified within the Factors That Might Influence the Decision of an Adjudicator chapter.

The weightings applied have been influenced by:

a) The early chapters of this research project;
b) Responses to the research questionnaire;
c) Discussions with colleagues and practitioners; and
d) Experience of Statutory Adjudication.

The Process

8.2 FACTOR A1. THE NOTICE OF ADJUDICATION

Question 1: Does a defective Notice of Adjudication affect predictability of a Decision?

Question 1: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and plus 1 in respect of the Defendant. It is likely given that the Claimant has had a theoretical unlimited time to prepare the Notice of Adjudication that an adjudicator would expect the Claimant to serve a valid Notice of Adjudication. If not it would generally follow that the Claimant is unsure as to what his/her case actually is. The Defendant is likely to gain a perceived or actual advantage as they are unlikely to have been able to deal with a claim when the Claimant is less than clear as to what their claim actually is.

Question 2: Does an objection to jurisdiction based upon a defective Notice of Adjudication affect the predictability of a Decision?

Question 2: Weighting Applied

The weighting applied was 0 in respect of the Claimant and minus 1 in respect of the Defendant. Objections to jurisdiction are likely to be viewed negatively by an adjudicator. Anecdotally, reasons suggested include that they detract from the time available in seeking to decide the dispute as the adjudicator has to deal with the objection instead. Such objections are raised without proper justification and they ultimately are seeking for an adjudicator to resign. Many such objections are invalid and therefore it is likely that the Defendant is likely to be viewed in a negative light, the Claimant is unlikely to benefit insofar that the Notice may have been defective, but is foreseeably unlikely to be viewed negatively further as such objections are generally considered purely tactical.

8.3 FACTOR A2. THE APPOINTMENT OF THE ADJUDICATOR

Question 3: If an adjudicator is named in the Contract does that affect the predictability of a Decision?

Question 3: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and plus 1 in respect of the Defendant. If an adjudicator is named in the Contract both parties will have agreed to him/her in the first instance as suitable to remedy a dispute and further, anecdotally, commentators suggest that a named adjudicator will feel grateful towards both parties and is likely to ensure that both parties receive something in his/her decision. Therefore, both parties have the potential to benefit from naming an adjudicator.

Question 4: Does having the right to select a particular Adjudicator Nominating Body affect the predictability of a Decision?

Question 4: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and 0 in respect of the Defendant. The Claimant has the right to select an Adjudicator Nominating Body. It is foreseeable that the Claimant will select an adjudicator best suited to the dispute, for example, a dispute that is concerned with

buildability might best suit an adjudicator from the Chartered Institute of Building (CIOB). It is also likely that a main contractor might opt for a member of the CIOB as he/she will most likely understand, on a practical level, how main contractors are organised and operate whereas an Architect may not. It is also foreseeable that a Claimant may seek to avoid a nominating body to which the Defendant is associated, for example if a main contractor is in dispute with an architect he/she might not want to apply to the Royal Institute of British Architects for the nomination of an adjudicator. On balance, it would appear likely that the Claimant might benefit from having the right to select a particular Adjudicator Nominating Body. The Defendant does not have such a right and therefore has no control.

Question 5: Does requesting a particular adjudicator or group of adjudicators affect the predictability of a Decision?

Question 5: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and minus 1 in respect of the Defendant. It is foreseeable that a party that requests a particular adjudicator or group of adjudicators will do so for good reason. From experience, one has seen this relate to previous decisions by an adjudicator in a Claimant's favour and/or a perception from a Claimant that they know what is likely to persuade an adjudicator or group of particular adjudicators. By contrast, the Defendant has little control, albeit they could object to the Adjudicator Nominating Body. It is likely to be negative for a Defendant as the Claimant could well be in a tactically better position if they have been before a particular adjudicator before, when the Defendant might not.

Question 6: Does a party excluding adjudicators affect the predictability of a Decision from an adjudicator not excluded?

Question 6: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and 0 in respect of the Defendant. If a Claimant seeks to exclude adjudicators an Adjudicator Nominating Body will ordinarily not seek to appoint those adjudicators. A Claimant is likely to seek to exclude those adjudicators that have decided against the Claimant previously, particularly if the case is similar in context. A Claimant might also benefit, as a new adjudicator is likely not to want to

join the excluded list. The Defendant will have little power in consequence of an excluded list, but equally should the Defendant refer a further dispute; they might have such a list. It remains possible but a new adjudicator might not be impacted by such a list in any event.

8.4 FACTOR A3. CHALLENGING JURISDICTION OF THE ADJUDICATOR

Question 7: Does objecting to jurisdiction affect the predictability of a Decision?

Question 7: Weighting Applied

The weighting applied was minus 2 in respect of the Claimant and minus 2 in respect of the Defendant. Its application would be directed by which party objected to jurisdiction. Either party could object to jurisdiction albeit it is more likely to be the Defendant. Some commentators suggest that such objections are endless and often meritless. Such objections have to be dealt with by the adjudicator and he/she has to decide to continue or resign. Commentators suggest that such objections are the scrambling for reasons not to partake and are perhaps indicative of a poorly prepared or weak case. Such objections are, unless valid, in which case the adjudicator will resign and not render a Decision, likely to be viewed negatively by the adjudicator.

8.5 FACTOR A4. THE REFERRAL NOTICE

Question 8: Does a defective/poor quality Referral Notice affect the predictability of a Decision?

Question 8: Weighting Applied

The weighting applied was minus 2 in respect of the Claimant and plus 1 in respect of the Defendant. Its application would be directed by whether a defective/poor quality Referral Notice was issued by the Claimant. A defective/poor quality Referral Notice is foreseeably difficult to justify to an adjudicator. In practical terms the Claimant has had an unrestricted amount of time to draft the Referral Notice and include the evidence upon which the Claimant choses to rely. A defective or poor quality Referral Notice really should not be presented to the adjudicator. In the instance that such a document is presented the Defendant is likely to be considered more

favourably by the decision maker as it suggests that the Claimant is unclear and lacking in support for its case against the Defendant. It is also unclear as to how the Defendant would have had the opportunity to respond to such a defective case prior to referral to adjudication.

8.6 FACTOR A5. COMPLIANCE WITH DIRECTIONS

Question 9: Does compliance or non-compliance with Directions affect the predictability of a Decision?

Question 9: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and minus 1 in respect of the Defendant. Its application would be directed by which party was in non-compliance with Directions. The adjudicators will issue Directions in order to direct the process leading to his/her decision. The adjudicator will expect compliance with his/her Directions. If the Directions are complied with as expected there is likely to be no consequence. However, if a party fails to comply with Directions the adjudicator might interpret that negatively and endure some frustration in issuing further Directions. The party failing to comply with Directions is likely to be viewed negatively by the adjudicator.

Question 10: Does belated compliance with Directions affect the predictability of a Decision?

Question 10: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and minus 1 in respect of the Defendant. Its application would be directed by which party was in belated compliance with Directions. Belated compliance with Directions can cause chaos during an adjudication. The adjudicator will have set out what is required by who and by when. If a party is late, the other party is likely to complain and want more time to take the next step; this in turn often results in the adjudicator having less time to decide. It is foreseeable that a party that is in dispute because they were late completing the project might be considered negatively if they are late complying with Directions. It is foreseeable that belated compliance with Directions could impact negatively upon the adjudicator.

8.7 FACTOR A6. THE RESPONSE

Question 11: Does a defective/poor quality Response affect the predictability of a Decision?

Question 11: Weighting Applied

The weighting applied was plus 2 in respect of the Claimant and minus 1 in respect of the Defendant. The Claimant is likely to benefit before the adjudicator if the Defendant issues a defective/poor quality Response to the Referral Notice. The Defendant is likely to be viewed negatively for not offering a better Response, despite having less time than was available to the Claimant in preparing the Referral Notice.

8.8 FACTOR A7. REFERRING PARTY'S REPLY

Question 12: Does the issuing of a Reply affect the predictability of a Decision?

Question 12: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and minus 1 in respect of the Defendant. One would expect that a Claimant will only issue a Reply to support its case and seek to discredit the case of the Defendant. My experience directs that a Reply is likely to be focused on supporting the Claimant's case, whilst also being a focused attack upon the Defendant's Reply.

8.9 FACTOR A8. REJOINDER

Question 13: Does the issuing of a Rejoinder affect the predictability of a Decision?

Question 13: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and plus 1 in respect of the Defendant. The Rejoinder is likely to be a focused attack on the Reply with the aim of supporting the Defendant's case and discrediting the Claimant's Reply.

8.10 FACTOR A9. TIMESCALES ASSOCIATED WITH THE PROCESS

Question 14: If the Responding party has only 7 days to furnish a Response, what affect does that have on the predictability of a Decision?

Question 14: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and minus 1 in respect of the Defendant. In practice, the minimum amount of time the Defendant will be given for a Response is 7 days. That is arguably insufficient time to respond to a detailed Referral Notice. In the instance that only 7 days is allowed for the Response it is foreseeable that the Claimant will benefit and the Defendant will be impacted negatively by such a restriction in time for putting their defence.

Question 15: If the Referring Party grants an extension of time of 14 days, does that affect the predictability of a Decision?

Question 15: Weighting Applied

The weighting applied was 0 in respect of the Claimant and plus 2 in respect of the Defendant. If the Claimant is requested to grant an extension of time by the adjudicator, then there is generally an expectation that the Claimant will. The Defendant can benefit quite significantly insofar as that usually results in them having more time to prepare and present their defence.

Question 16: If the Referring Party refuses to grant an extension of time, does that affect the predictability of a Decision?

Question 16: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and 0 in respect of the Defendant. It is foreseeable that the adjudicator, having asked for an extension of time in order to justly determine the dispute, will view the Claimant negatively if such an extension of time is not granted. The Defendant has no control over the decision to grant an extension of time or not, but if the adjudicator is determined that an extension of time is necessary he/she might threaten to resign, causing the referring party the need to start a fresh adjudication. On balance, refusing to grant an extension of time is likely to be viewed negatively by the adjudicator.

Question 17: If the parties jointly extend time, does that affect the predictability of a Decision?

Question 17: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and plus 2 in respect of the Defendant. It is foreseeable that if the parties jointly agree to an extension of time then the Claimant will be viewed positively by the adjudicator for seeking to allow sufficient time for a just decision. It is also likely that the Defendant will be viewed positively by the adjudicator and further they will have more time to prepare and serve the documentation that form their considered defence.

Question 18: Does the adjudicator having longer than 42 days to decide the dispute affect the predictability of a Decision?

Question 18: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and plus 2 in respect of the Defendant. If the adjudicator takes longer than 42 days to decide it is foreseeable that the Claimant will have lost his/her advantage of referring the dispute based on documents he/she has had unlimited time to prepare. The Defendant is likely to benefit by having more time to prepare a series of documents in its defence.

Question 19: Does rendering a Decision within 28 days affect the predictability of that Decision?

Question 19: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and minus 1 in respect of the Defendant. If the adjudicator has only the minimum 28 days to decide the dispute, the Claimant will have the advantage of preparing his/her case and limiting the Defendant in terms of time to furnish any defence and will limit the adjudicator in making enquiries into the Claimant's case. The Claimant is likely to be at an advantage if only 28 days is permitted to determine the dispute.

The Person

8.11 FACTOR B1. PROFESSIONAL BACKGROUND

Question 20: Does having the same professional background as the adjudicator affect the predictability of a Decision?

Question 20: Weighting Applied

The weighting applied was plus 2 in respect of the Claimant and plus 2 in respect of the Defendant. Its application would be directed by whether the Claimant and/or Defendant had the same professional background as the adjudicator. Anecdotally it is mooted that a party that is a chartered surveyor for example will be viewed favourably by an adjudicator that is from a surveying background; the same may be suggested of a main contractor before a chartered builder.

8.12 FACTOR B2. LEGALLY QUALIFIED ADJUDICATORS

Question 21: Does the fact that the Decision Maker is legally qualified (or not) affect the predictability of a Decision?

Question 21: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and plus 2 in respect of the Defendant. It is mooted by industry that legally qualified professionals make more informed, deliberative decisions based upon the applicable law. Further, some practitioners suggest that consequent of their training, legally qualified adjudicators place the burden firmly upon the Claimant to adequately demonstrate and support its case. This suggests some benefit to a Claimant in terms of the decision maker being informed and deliberative in applying the law, but further potentially benefits the Defendant insomuch that the Claimant is more likely to be assessed by a firm burden and standard of proof.

8.13 FACTOR B3. PROACTIVE V PASSIVE APPROACH

Question 22: Does a Proactive or Passive approach affect the predictability of a Decision?

Question 22: Weighting Applied

The weighting applied was subject to whether a Proactive or Passive approach was adopted:

a) If a Proactive approach was adopted the weighting applied was plus 1 in respect of the Claimant and plus 2 in respect of the Defendant. The Claimant is likely to benefit to some degree by the questions and clarification sort by the adjudicator however, the Defendant is likely to benefit more as having had less time to prepare a Response they will likely benefit by the adjudicator taking time to ask questions/investigate in order to understand or clarify queries in their submission(s).
b) If a passive approach is adopted the Claimant will likely benefit having had more time to prepare its case and furnish potentially better submissions, but will have limited or no opportunity to clarify hence plus 1 was applied. The Defendant will have had less time and any points that may be clarified by a contrasting proactive approach will likely be lost, thus minus 1 was applied.

8.14 FACTOR B5. POTENTIAL FOR 'CUSTOMER BUILDING'

Question 23: Does potential 'customer building' to repeat adjudicator clients affect the predictability of a Decision?

Question 23: Weighting Applied

The weighting applied was plus 2 in respect of the Claimant and plus 2 in respect of the Defendant. Its application would be directed by which party (if any) an adjudicator is more likely to potentially 'customer build' towards. For example, a repeat and regular main contractor who often participates in adjudication is more likely to be a potential customer to an adjudicator than a small developer.

8.15 FACTOR C1. THE COMPLEXITY OF THE DISPUTE

Question 24: In professional negligence disputes, does the profession of the adjudicator, being closer to that of a party, affect the predictability of the Decision?

Question 24: Weighting Applied

The weighting applied was plus 2 in respect of the Claimant and plus 2 in respect of the Defendant. Its application would be directed by which party (if any) was most closely linked to the profession of the adjudicator. It is anecdotally mooted by practitioners that, for example an Architect adjudicator is less likely to decide against an architect and a chartered surveyor adjudicator is less likely to decide against a chartered surveyor.

Question 25: Does the fact that a dispute is simple affect the predictability of a Decision?

Question 25: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and plus 1 in respect of the Defendant. The legislation always intended that relatively simple disputes would be dealt with by adjudication. Both the Claimant and Defendant would appear to benefit as the Claimant is likely to have utilised the process for a simple dispute as intended and the Defendant is likely to benefit by having a simple matter to deal with in the typically short time frame available.

Question 26: Does the fact that a dispute is complex affect the predictability of a Decision?

Question 26: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and minus 2 in respect of the Defendant. If a dispute is complex it is potentially likely to be less predictable given the likely time frame and nature of adjudication, with for example no hearing and the associated right to challenge evidence in cross examination. The Claimant will likely be at a dis-benefit for utilising a process that envisaged resolving simple disputes. The Defendant will

potentially be at even more of a disadvantage trying to respond to a complex dispute in a limited time frame with potentially the absence of a hearing or the benefit of significant testing of the Claimant's case.

8.16 FACTOR C2. VERBAL OR PART VERBAL DISPUTES

Question 27: Does the fact that a contract is verbal or part verbal affect the predictability of a Decision?

Question 27: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and minus 1 in respect of the Defendant. It is mooted in industry that allowing verbal or part verbal contracts into adjudication since 2011 is a dis-benefit and necessarily, due to its vague nature, will likely render a decision less predictable for the parties involved in the dispute.

The Parties or their Representatives

8.17 FACTOR D1. THE QUALITY OF SUBMISSIONS BY THE PARTIES

Question 28: Does the fact that the adjudicator complained about the parties' submissions affect the predictability of a Decision?

Question 28: Weighting Applied

The weighting applied was minus 2 in respect of the Claimant and minus 2 in respect of the Defendant. Its application would be determined by which party's submissions (if any) the adjudicator complained about. In the instance that an adjudicator complains it is likely to impact negatively upon that party in the adjudication and will likely impact predictability of a decision.

8.18 FACTOR D2. EXPERT REPORTS

Question 29: Does the furnishing of an expert report affect the predictability of a Decision?

Question 29: Weighting Applied

The weighting applied was plus 2 in respect of the Claimant and plus 2 in respect of the Defendant. Its application would be determined by which party obtained an expert report. It is mooted that an adjudicator is likely to be influenced by an expert report in coming to a decision. A party with an expert report is arguably likely to benefit accordingly.

8.19 FACTOR D3. THE FIRST AND LAST WORD

Question 30: Does the fact that a party referred the dispute affect the predictability of the Decision?

Question 30: Weighting Applied

The weighting applied was plus 2 in respect of the Claimant and 0 in respect of the Defendant It is often debated that a Claimant should not have to refer to adjudication a dispute for monies that are rightfully theirs. Some commentators suggest that the very fact that a dispute is referred before a third party supports the fact that something is due to that party and that an adjudicator might well recognise that. That said there are instances where a Defendant can offer surprising valid defences. On balance, a Claimant in more instances than not will be likely be entitled to recover something.

Question 31: Does having the last word affect the predictability of a Decision?

Question 31: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and plus 1 in respect of the Defendant. Its application would depend on which party actually had the last word. Some contend that having the last word is valuable and remains with the adjudicator whilst reaching his/her decision.

8.20 FACTOR D4. THE EXTENT OF SUBMISSIONS

Question 32: Do further submissions by the parties affect the predictability of a Decision?

Question 32: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and plus 1 in respect of the Defendant. Its application would depend upon which party (if

any) made further submissions. It might impact predictability by reference to who made further submissions in support of their case.

8.21 FACTOR D5. THE SELECTION OF PARTY REPRESENTATIVES

Question 33: Does employing well-known construction lawyers affect the predictability of a Decision?

Question 33: Weighting Applied

The weighting applied was plus 1 in respect of the Claimant and plus 1 in respect of the Defendant. Its application would depend upon which party (if any) appointed well-known construction lawyers to represent them, the benefit being that they would likely be well versed in adjudication.

Question 34: Does employing well-known claims consultants affect the predictability of a Decision?

Question 34: Weighting Applied

The weighting applied was plus 2 in respect of the Claimant and plus 2 in respect of the Defendant. Its application would depend upon which party (if any) appointed well-known claims consultants to present them, the benefit being that they would likely be well versed in construction and the applicable law.

Question 35: Does a party choosing not to be represented affect the predictability of a Decision?

Question 35: Weighting Applied

The weighting applied was minus 1 in respect of the Claimant and minus 1 in respect of the Defendant. Its application would depend on which party (if any) chose not to be represented. Not being represented in an adjudication is likely to be a disadvantage unless a party is well versed in law and adjudication.

8.22 FINDINGS DERIVED FROM RUNNING THE EXPLANATORY MODEL

The Explanatory Model was applied to 50 previously made adjudicators' decisions. The full set of results are contained in Appendix 2 within an Excel spreadsheet entitled 'Explanatory Model Results'.

The Explanatory Model displayed two distinct set of results. The first set, set 1, determined whether one could predict whether a party would win or lose. A win, as is typically considered in litigation and arbitration (and subsequent cost applications) is where a Claimant recovers 50% or more of the sum that it claims.

Although the Claimant is normally seeking money, there are a few claims where the Claimant is seeking a decision in relation to time. Typical examples are when the Claimant is seeking a decision in an extension of time claim. The same 50% or more for the Claimant was applied to such decisions to remain consistent.

8.23 SET 1 WIN OR LOSE

It can be seen that by reference to the total score of the Claimant and the Defendant that the Explanatory Model was able to predict, by reference to the higher score who would win and who would lose in 92% of the decisions tested. Only four decisions had scores that did not reflect the outcome correctly. The decisions that were predicted correctly in terms of winning or losing have their outcome highlighted in green on the spreadsheet and those that were not predicted correctly are highlighted in red. As a simple win or lose assessment the Explanatory Model was reliable in terms of prediction. It was notable that in some that were incorrectly predicted the scores were the same or close, with the exception of one. However, the same can be said of some of the decisions that the Explanatory Model predicted correctly; the winning and losing scores were also close in some instances, which suggests if some of the factors that were not relevant to that case were found to apply, the overall score could be rendered incorrect.

8.24 SET 2 PERCENTAGE OF RECOVERY

The parties to a dispute might want to establish more than whether they would win or lose. A party might want to know by what degree they might win or lose before opting to settle or incur the cost of an adjudication. The Explanatory Model was applied to seek to predict the percentage of recovery for the Claimant and to what extent that could be accurately predicted. This in turn resulted in the analysis below:

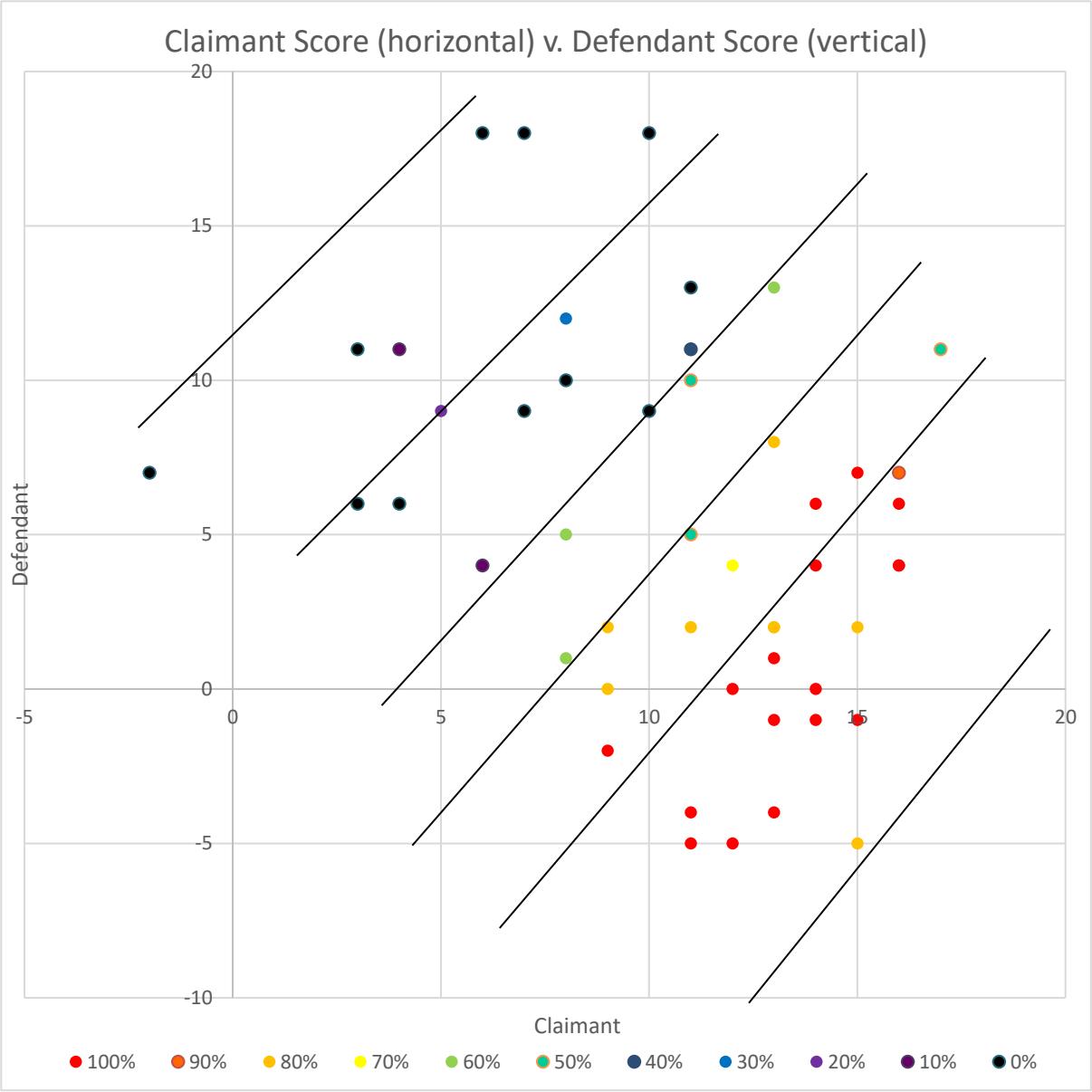

Figure 8.1 Claimant Score (horizontal) v. Defendant Score (vertical)

For each decision, the Claimant score (x-axis) v. Defendant score (y-axis) has been plotted. In addition, the points were colour-coded according to percentage recovered for the Claimant as set out in the legend above. For clarity, a point coloured red indicates a recovery of 100% of the sum claimed for the Claimant, burnt orange indicates a recovery of 90% of the sum claimed for the Claimant and so on down to black at the right hand end of the scale which indicates a recovery of 0% of the sum claimed by the Claimant.

The points were colour-coded according to the rainbow (red, orange, yellow, green, blue, indigo, violet) as it was felt that this would flow through a familiar colour change and would aid the identification of any pattern.

When the graph was studied, the pattern established was very encouraging in terms of predictability, with there being significant clustering on the graph of points of the same colour, demonstrating that decisions with similar percentages of recovery for the Claimant had similar scores. The clusters tended to be in bands (of positive gradient) starting at the bottom right of the graph with red points tending to orange points followed by bands of yellow, green, blue, indigo to black points as one moved upwards towards top left, although the bands weren't so distinct at the higher (less successful for the Claimant) end. This progression of colours across the graph was in the same order as the legend, indicating that decisions with 100% successful recovery for the Claimant (the red points) had scores resulting in points at the bottom right of the graph, and as the rate of successful recovery fell, the Claimant's score dropped whilst the Defendant's score rose. This gave a progressive colour change through the graph so that at the opposite (top left) part of the graph the points represented cases where the Claimant's recovery was towards 0% and the Defendant had a high degree of success and these points were predominantly black.

Lines have been drawn to indicate broad bands that contain similar coloured points, i.e. decisions with around the same percentage of recovery for the Claimant. The bands contain points ranging in success by about 20% starting with 80 - 100% Claimant success to the bottom right (the red points) moving to a band of mainly orange and yellow points where the Claimant recovered 60 – 80% of the amount claimed. The middle band contained decisions that were from 40 – 60% successful in recovery were light and dark green points

followed by the next band containing blue and purple points where the Claimant's success was in the region of 20 – 40%. The points in the final band in the top left of the graph were predominantly indigo and black demonstrating a less than about 20% recovery of the amount claimed.

Not unexpectedly, there were a few exceptions to the pattern so when applying this method to the Explanatory Model data it can be seen that some of the percentages recovered, contrasted with the scores achieved, do not sit so well with predictability. That accounts for their incorrect positioning on the graph above. Examples include decision numbers 23, 39, 40 and 49. These are poor in terms of predicting the expected percentage the Claimant recovered. Four further examples were not entirely accurate (decisions 41, 47, 48 and 50) but were much more predictable than the four decisions listed above.

The results suggest that in terms of recovery by the Claimant the Explanatory Model was 84% reliable (42 points fall into the pattern well, out of the 50 decisions) in terms of predicting the percentage recovered by the Claimant.

This chapter and chapter 7 of the thesis serve to meet objective 4, to identify factors from the Process, the Decision Maker (the Person), the Dispute and the Parties or their Representatives that might influence decision-making and then weight them in order to present an Explanatory then Predictive Model.

9 REFINE THE EXPLANATORY MODEL INTO A PREDICTIVE MODEL

In contemplating the refining of the Explanatory Model it was decided not to adjust the weighting as a high degree of accuracy, in terms of predicting winning or losing, had been achieved. In seeking to improve the Model, whilst still seeking to establish a reliable win-lose prediction, it was decided to focus on the percentage of recovery. The aim was to improve the accuracy by which the percentage of recovery could be predicted.

9.1 SET 1 WIN OR LOSE

In the Explanatory Model it seemed that if the Claimants' score was higher than the Defendants', the Claimant was likely to win and vice versa. A line showing equal scores, D = C, where D = Defendant's score on the y-axis and C = Claimant's score on the x-axis has been drawn on Figure 9.1 below to illustrate this.

Figure to Illustrate Regions Showing Success or Failure

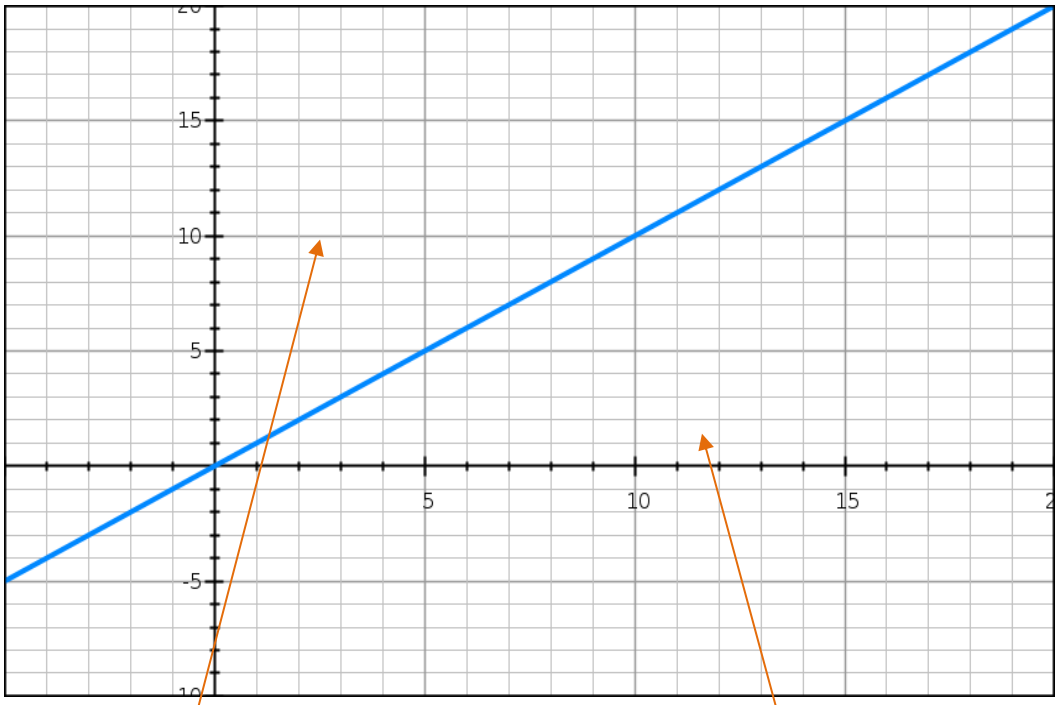

Figure 9.1 Regions for Showing Success or Failure

D > C Claimant recovers less than 50%. Claimant score is less than the Defendant score

D < C Claimant recovers at least 50%. Claimant score is more than the Defendant score

9.2 SET 2 THE PERCENTAGE OF RECOVERY

As the lines drawn in the Explanatory Model, creating bands of similar percentage recovery (circa 20%), had been placed by eye a more definitive way to position some appropriate lines was required. The model has been refined by formalising the lines, using Mathematical reasoning, that sectioned off decisions with similar percentages of recovery. Equations were established for these lines that related the Claimant's score to the Defendant's score and these lines sectioned the graph area into four regions where the outcome of a claim could be reliably predicted. By lowering the number of bands and positioning them appropriately, it was foreseeable that the predictability of recovery could be improved.

The positioning of the lines was considered by reviewing the clusters of points of similar colour on the Explanatory Model and seeking to section

them off to maximum effect. The positioning of the lines are as follows, where C = score of Claimant and D = score of Defendant:

D = 1.5C + 3

D = 1.5C - 5

D = 1.5C – 15

It was decided to use lines with gradient 1.5, for consistency, as this gradient suited the separation of different coloured points well. Figure 9.2 below illustrates this.

These lines split the graph into 4 regions as shown on diagram below, again with Defendant's score on the y-axis and C = Claimant's score on the x-axis:

Figure to Illustrate Regions for Plotting Outcomes

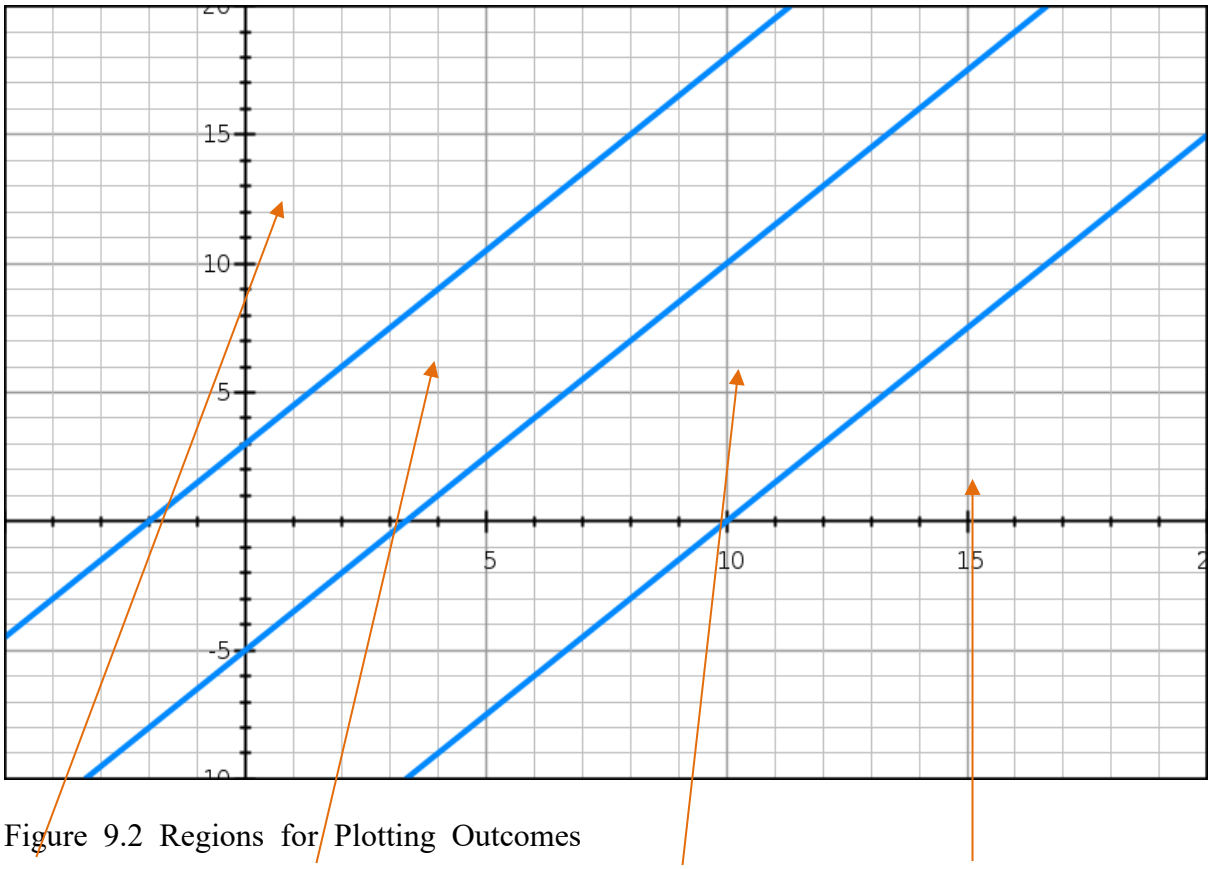

Figure 9.2 Regions for Plotting Outcomes

D > 1.5C + 3 1.5C – 5 < D < 1.5C + 3 1.5C – 15 < D < 1.5C – 5 D < 1.5C – 15

If a decision is analysed and scored according to the model then the outcome can be predicted according to where the point fell on the diagram as follows:

Table of Formula

$D > 1.5C + 3$	Claimant would be no more than 10% successful
$1.5C - 5 < D < 1.5C + 3$	Claimant would be between 10% and 50% successful
$1.5C - 15 < D < 1.5C - 5$	Claimant would be between 50% and 80% successful
$D < 1.5C - 15$	Claimant would be at least 80% successful

Table 9.1 Formula

In addition, the predictability in terms of winning or losing can be determined by considering the colour of the points lying above and below the line D = C. Points above the line represent decisions in which the Defendant's score was higher than the Claimant's and so it would be expected that the Defendant is successful (i.e. the Claimant recovers less than 50% so the points should be blue, indigo and black). Those below the line D = C represent decisions in which the Claimant's score was higher than the Defendant's and so it would be expected that the Claimant is successful (i.e. the Claimant recovers at least 50% so the points should be green, yellow, orange and red). Exceptions to these colours would indicate a decision where the outcome had not been correctly predicted.

The Predictive Model was then run with the original data plus an additional 75 decisions.

10 TEST THE PREDICTIVE MODEL AGAINST ADJUDICATORS' DECISIONS

The spreadsheet in Appendix 3 contains the data from 125 decisions utilised to test the Predictive Model.

The Predictive Model was run and the results are presented and analysed within the next Chapter.

11 PRESENT AND ANALYSE THE RESULTS

11.1 SET 1 WIN OR LOSE

By inspection of the Predictive Model spreadsheet in Appendix 3 entitled 'Predictive Model Results' it can be seen that by review of the total score of the Claimant and the Defendant that the Predictive Model was able to predict, by reference to the higher score who would win and who would lose in 95% of the decisions tested. Only six decisions had scores that did not reflect the outcome. The decisions that were predicted correctly in terms of winning or losing have their outcome highlighted in green on the spreadsheet and those that were not predicted correctly are highlighted in red.

This was interesting as the Explanatory Model only included four decisions that were not predicted correctly. Further, by reference to Decision no. 54 it could be seen that the adjudicator erred in the law applied and if he had not done so, the decision would ordinarily have been correctly predicted. This, one suggests, runs to the quality issue identified earlier in the text. It also suggests that some level of unpredictability will flow from mistakes by the adjudicator, which is likely unavoidable.

Taking the above into account the predictability in terms of winning or losing remained largely stable at 95% (as opposed to 92% result from the Explanatory Model) across the sample, which had increased in size from 50 to 125 decisions.

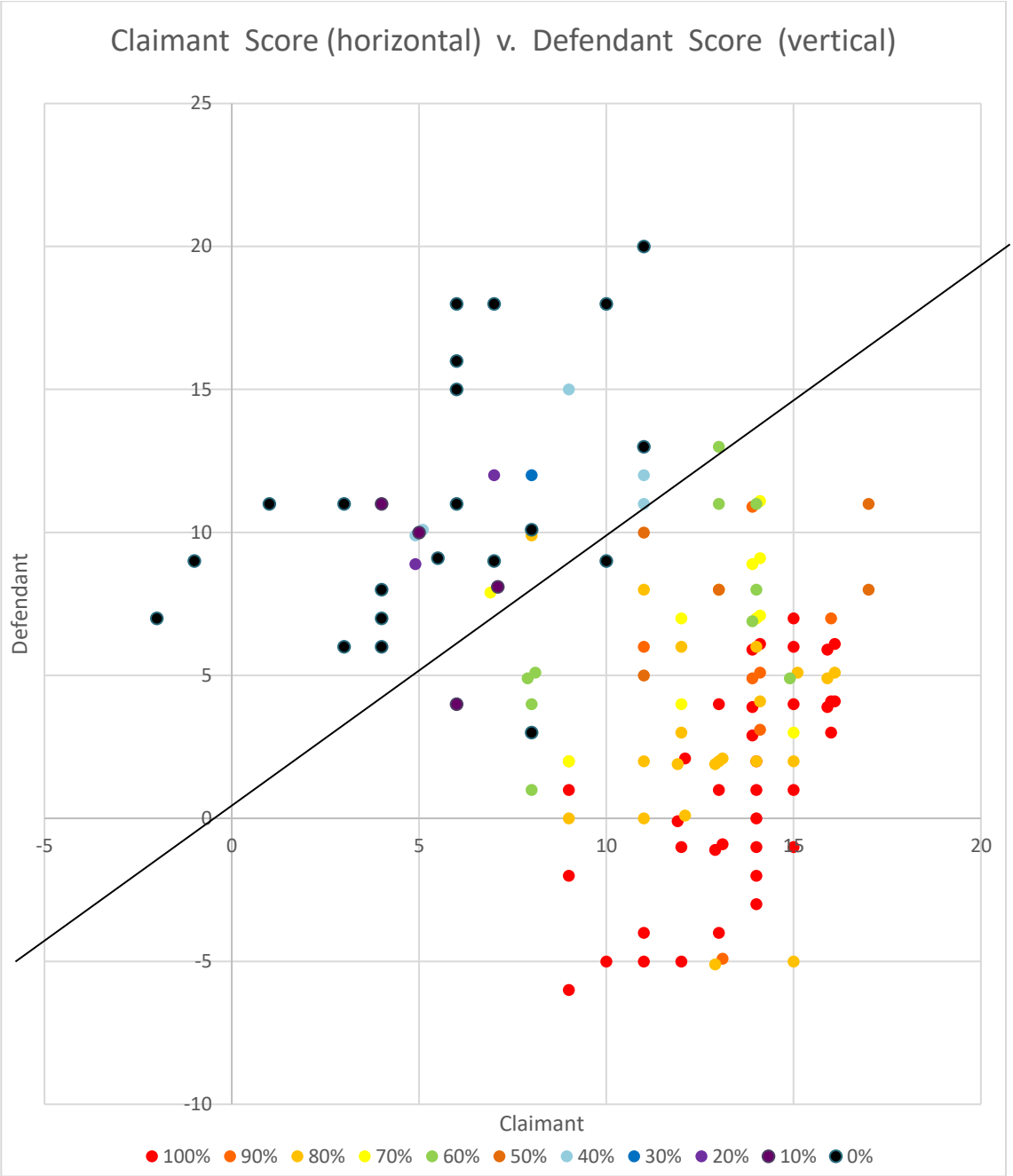

Figure 11.1 Predictive Model Graph for Success/Failure

By comparing the colour of the points on either side of the line (which shows where the Claimant and Defendant have equal scores) it can be seen that in the lower right hand side of the graph the points are mainly red, orange, yellow and green i.e. the Claimant was at least 50% successful in recovery. In the upper left section of the graph the points are mostly blue, indigo and black i.e. the Claimant was less than 50% successful. This suggests that the position of a point representing a particular decision can reasonably reliably be used to predict the likelihood of success or failure in terms of recovery. As mentioned earlier there are six points that don't fall

where expected, or the outcome wasn't as expected. Decisions 9, 51 and 57 represent decisions in which the Claimant was more than 50% successful yet they lie in the upper left of the graph (where points in the Defendants' favour otherwise lie) and decisions 23, 39 and 54 represent claims where the Claimant was less than 20% successful yet these lie in the lower right of the graph where points in the Claimants' favour otherwise lie. Ultimately, all but six points fall in the correct area so the predictability is 119 out of 125 i.e. about 95%.

11.2 SET 2 PERCENTAGE OF RECOVERY

In terms of predicting percentages of recovery for the Claimant, the running of the Predictive Model generated the results illustrated diagrammatically below:

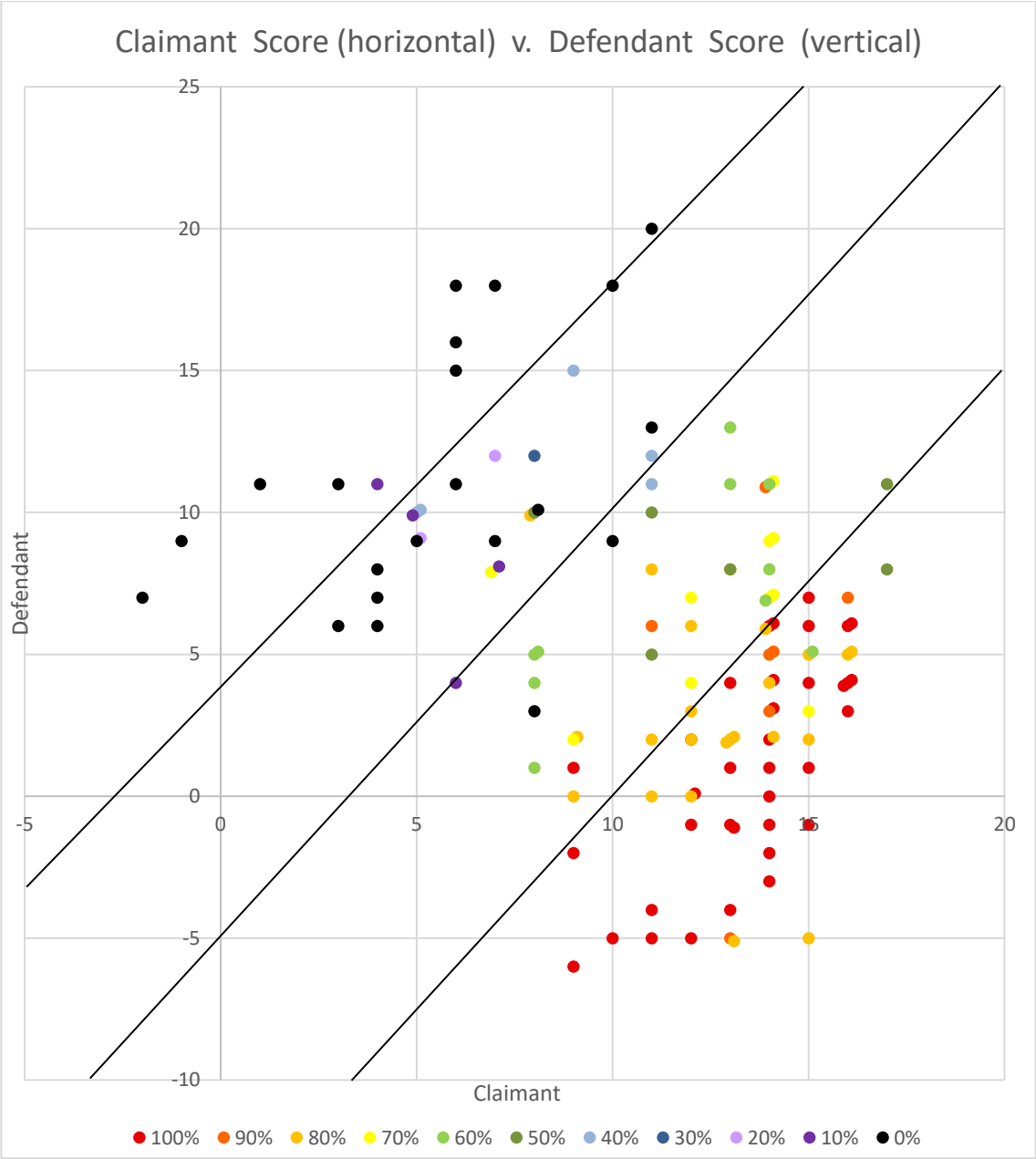

Figure 11.2 Predictive Model Graph for Recovery

In the first instance, once the graph was plotted it was noted that there were not enough dots relative to the number of decisions. Inspection revealed that in a small number of cases, some dots represented more than one decision, as the cases had the same scores. Examples of this are decisions 60, 79 and 124 that all had a Claimant score of 5 and Defendant score of 10 as well as decisions 56, 65 and 66 that all had a Claimant score of 14 and Defendant score of 11; there were other dots produced likewise by 2 or 3 decisions. This was overcome by plotting the relevant cases at +0.1 or -0.1 of their

values for purposes of illustration, i.e. the dot coordinates for the point at (14, 11) were changed for the 3 decisions to (13.9, 10.9), (14.1, 11.1) and (13.9, 14). This had the effect of producing 3 dots that shadowed each other but then allowed the 3 colours to each be seen, and also to reflect the true density of the dots.

The results are as follows:

Table of Results

If $D > 1.5C + 3$	10 out of 10 decisions were correctly predicted (100%)
$D = 1.5C + 3$	1 case fell on the line $D = 1.5C + 3$ and was correctly predicted
If $1.5C - 5 < D < 1.5C + 3$	9 out of 21 decisions were successfully predicted (43%)
$D = 1.5C - 5$	1 case fell on the line $D = 1.5C - 5$ and was incorrectly predicted
If $1.5C - 15 < D < 1.5C - 5$	29 out of 33 decisions were correctly predicted (88%)
$D = 1.5C - 15$	4 decisions fell on the line $D = 1.5C - 15$ and were correctly predicted
If $D < 1.5C - 15$	52 out of 55 decisions were correctly predicted (95%)

Table 11.1 Results

The overall correctly predicted decisions against the Model was 104 out of 125, giving 83% reliability.

It was found that in general with numerical scores that were far apart with the Claimant scoring low and the Defendant scoring high, the decisions were highly predictable (11/11 = 100%). These were the decisions in which the Claimant was no more than 10% successful.

The same can be said for were the Claimant scores high and the Defendant scores much lower; such decisions were found to be highly predictable. (55/59 = 93%). These are the cases where $D \leq 1.5C - 15$. These were the decisions in which the Claimant was at least 80% successful.

The challenge to the Predictive Model comes when the scores are much more evenly matched. Generally, there is correlation between predictability and proximity of scores. The closer the scores are, the more difficult the decision is to predict in terms of percentage recovery. In the combined middle groups where $1.5C - 15 < D < 1.5C + 3$ the success rate was 39/55 (= 71%) which is much less impressive than the two extreme groups.

One particular factor that should be acknowledged relates to question 26, the complexity of the dispute. Many commentators have said that complex disputes are unpredictable in adjudication. The results of this research suggest that not to be the case, albeit it also relies on other factors. All of the complex disputes were correctly predicted based on a pure win or lose consideration. The predictability of the percentage of recovery concluded that 5 out of 7 (= 71%) were correctly predicted in relation to complex decisions numbered 62, 64, 65, 66, 117, 119 and 120.

This chapter and chapter 7 of the thesis serves to meet objective 4, to identify factors from the Process, the Decision Maker (the Person), the Dispute and the Parties or their Representatives that might influence decision-making and then weight them in order to present an Explanatory then Predictive Model.

12 DETERMINE WHETHER ADJUDICATORS' DECISIONS CAN BE RELIABLY PREDICTED

The running of the Explanatory and Predictive Model concluded that based on purely winning or losing, the outcome could be predicted circa 95% (92% for the Explanatory Model and 95% of the time for the Predictive Model, after correction of one decision where the adjudicator erred in law), by reference to a sample of 125 decisions. This suggests that the Predictive Model can be reliably utilised to predict whether a party will win or lose an adjudication.

Some caution is however needed as some scores were, whilst correct in terms of winning or losing, very close numerically. This suggests that one factor being in difference may render that particular prediction wrong.

Where the scores are close together there would generally appear to be correlation to the degree of success in some, but not all instances, for example decision No. 26 where the Claimant scores 11 and is 50% successful and the Defendant scores 10 and is 50% successful and also decision No. 107 where the Claimant scores 13 and is 60% successful and the Defendant scores 11 and is 40% successful. In contrast in decision No. 23, the Claimant scores 10 and the Defendant scores 9 yet the Claimant is wholly unsuccessful.

As to predicting the percentage of recovery the Claimant would receive, this could be reliably predicted with 83% reliability.

By applying the Predictive Model to the sample of 125 decisions it can be said that adjudicators' decisions can be reliably predicted. That is significant and beneficial to the construction industry. Such a finding could potentially save substantial sums in seeking to resolve construction disputes.

Chapters 10, 11 and 12 of the thesis serve to meet objective 5, to run the Predictive Model to establish whether adjudicators' decisions can be reliably predicted and report the findings.

12.1 RECOMMENDATIONS

The results of this research could be valuably deployed by the construction industry in determining how to proceed in formal dispute resolution. It is therefore recommended that the research is adopted in the construction industry. It is anticipated that typical stakeholders to a construction project could benefit significantly by deploying this research, this would include main contractors and subcontractors who are regularly in dispute, employers and main contractors who also fall into dispute, albeit typically on a less frequent basis. Professional consultants also feature in construction disputes and it is foreseeable that adopting this research could result in less claims being presented to professional indemnity insurers as stakeholders would know when it would be advisable to settle or not pursue/defend a claim presented to Statutory Adjudication.

The above section of the thesis serve to meet objective 6, to make recommendations resultant of the research.

12.2 FURTHER RESEARCH

However, it is also recommended that further resources are deployed to test further decisions, as the sample is small contrast with the number of adjudications that have actually been conducted. The running of the model against a larger sample may allow for further refinement of the Predictive Model to facilitate even greater accuracy in prediction. By contrast, it may render the decisions less predictable by reference to the content of the extended sample. That is a matter for further research based upon a larger sample in due course. Another consideration would be that the Model may be improved if curves rather than straight lines were used. There is some difficulty in collecting decisions from a private process and that would be a challenge that would need to be adequately resourced going forward and it is recommended that strong links to industry and decision makers are established and maintained to facilitate further research. If further research supported the degree of predictability established in this research project, significant resources could be saved by the construction industry. Typical construction project stakeholders could benefit significantly from further research.

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APPENDICES

APPENDIX 1 THE QUESTIONNAIRE

Anglia Ruskin University

Department of Engineering and the Built Environment

Statutory Adjudication Survey

Subject No…….. **Date……**

Part 1 Contextual Information

1. Gender - Male/Female

   Age Range 30 – 40 41 – 50 51 – 60 61 – 70 70+

2. Please indicate your primary profession?

   Lawyer Quantity Surveyor Engineer Architect Other

3. How many years of experience do you have in your primary profession?

   0 – 5 6 – 11 12 – 17 18 – 23 in excess of 24

4. Have you ever been employed as a member of staff by any of the following? (if more than one please select the type of organisation for which you have served the most time as an employee)

   Main Contractor Sub Contractor Consulting Business Client Organisation

5. If so in what capacity?

   ……(Please Specify)

6. Which of the following best describes your highest level of academic qualification?

   HNC/D Degree Higher Degree Research Degree

7. Please indicate which professional qualification(s) you possess:

   ……

   ……..

8. Please indicate which organisation, if any, provided training for you as an adjudicator?

   CIArb RICS RIBA ICE TeCSA

   Other (Please Specify)……..

9. Please state how many adjudications you have undertaken?

   1 – 25 26 – 50 51 – 75 In Excess of 75

10. Do you also act as an Arbitrator?

    Yes No

Part 2 Attitudes

11. In regard to the adjudications you have conducted, to what extent does current legislation properly provide for effective statutory adjudication?

    never occasionally usually mostly always

    1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

12. How often do you find that a dispute is too complex for adjudication?

    never occasionally usually mostly always

    1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

13. How appropriate is adjudication as a forum to determine a professional negligence claim?

    never occasionally usually mostly always

    1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

14. How effective is adjudication in resolving simple disputes?

    not at all not very averagely very extremely

    1…..……2…..……3……..…4…..……5…..……6……..…7……..…8…….....9

15. Do you consider that it would be beneficial to the process if the Responding Party was also able to grant an extension of time (of 14 days) for the decision making by the adjudicator?

    not at all not very averagely very extremely

    1…..……2…..……3……..…4…..……5…..……6……..…7……..…8…….....9

16. If the Responding Party has more time does it furnish a better Response?

    never occasionally usually mostly always

    1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

17. If the Responding Party has more time is it generally more successful with its Defence and/or Counterclaim?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

18. Would more time to decide benefit the adjudication process?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

19. Do parties generally underestimate the time and resources needed to effectively take part in an adjudication?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

20. Is 28 days long enough to decide a dispute?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

21. The consequence of a wrong decision is of less importance as the decision is temporarily binding.

disagree strongly disagree neutral agree agree strongly

1……..…2……..…3…..……4…..……5…..……6……..…7…….…8……..9

22. The Referring Party is generally the most successful in an adjudication.

disagree strongly disagree neutral agree agree strongly

1……..…2……..…3…..……4…..……5…..……6……..…7…….…8……..9

23. Is the most informative document in an adjudication the Referral?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

24. Based on the adjudications you have conducted is the Response a better quality document than the Referral?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

25. Is it your experience that a Reply (or subsequent submission) adds little benefit to the adjudication?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

26. Once a dispute has already crystallised, adjudication submissions should be limited to the Notice, Referral and Response?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

27. Should the Referring Party provide a better quality Notice and Referral?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

28. Should the Responding Party provide a better quality Response?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

29. Should submissions in adjudication be better quality?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

30. When you read submissions, how frequent are there valid heads of claim/defence missed/ignored by the parties?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

31. How effective are Adjudicator Nominating Bodies (ANBs) at monitoring the quality of adjudicators?

not at all not very averagely very extremely

1…..……2…..……3……..…4…..……5…..……6……..…7……..…8…….…...9

32. Is it apparent to you that some adjudicators would benefit from further training?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

33. To what extent do you agree with the submission that the quality of adjudicators was a concern in the past but it no longer is?

disagree strongly disagree neutral agree agree strongly

1……..…2……..…3…..……4…..……5…..……6……..…7…….…8……..9

34. How important is it for parties to an adjudication to be represented by a third party?

not at all not very averagely very extremely

1…..……2…..……3……..…4…..……5…..……6……..…7……..…8…….…...9

35. Is it your experience that if a party is represented by a third party more detail is included in the decision document?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

36. How important to a successful adjudication is it to have lawyers as third party representatives?

not at all not very averagely very extremely

1…..……2…..……3……..…4…..……5…..……6……..…7……..…8…….…...9

37. To what extent do third party representatives distract from making a decision?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

38. Do you consider that objections to jurisdiction are a distraction from the process of adjudication?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

39. How often do you find that when a party objects to jurisdiction they have a weak case?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

40. How often are complaints against adjudicators unfounded?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

41. Are complaints against adjudicators a distraction from the process of adjudication?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

42. A party that fails to comply with directions are likely to be less successful in adjudication?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

43. How often do expert reports aid decision making in adjudication?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

44. How important to a successful adjudication is it for a party to include more cases in support of their case?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

45. How important is it for parties to be experienced in the adjudication process to be successful in an adjudication?

not at all not very averagely very extremely

1…..……2…..……3……..…4…..……5…..……6……..…7……..…8…….....9

46. Could Adjudicator Nominating Bodies (ANBs) better allocate adjudications to individual adjudicators?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

47. Is it your experience that an adjudicator can be too busy?

never occasionally usually mostly always

1…..……2…..……3……..…4……..…5…..……6……..…7.....…8…….....9

48. How beneficial would it be to adjudication to publish all adjudicators' decisions, in much the same way as court judgments?

not at all not very averagely very extremely

1…..……2…..……3……..…4…..……5…..……6……..…7……..…8…….....9

Part 3 Two Final Questions

49. On balance which type of party do you consider benefits most from adjudication?

Client Organisation Professional Practice Subcontractor Main Contractor

50. Commentators suggest that adjudication can be unpredictable. Please indicate three reasons why you think this might be so:

1……
……
……
……

2……
……
……
……

3……
……
……
……

Part 4 Thank You

Thank you for taking the time to participate in this research. Your contribution is greatly appreciated.

Appendix 2 Explanatory Model Results

Decision	The Process	1 Does a defective Notice of Adjudication affect predictability of a Decision?	2 Does an objection to jurisdiction based upon a defective Notice of Adjudication affect	3 If an adjudicator is named in the Contract does that affect the predictability of a Decis	4 Does having the right to select a particular Adjudicator Nominating Body affect the pr	5 Does requesting a particular adjudicator or group of adjudicators affect the predictab	6 Does a party excluding adjudicators affect the predictability of a Decision from an adj	7 Does objecting to jurisdiction affect the predictability of a Decision?	8 Does a defective/poor quality Referral Notice affect the predictability of a Decision?	9 Does compliance or non-compliance with Directions affect the predictability of a Deci	10 Does belated compliance with Directions affect the predictability of a Decision?	11 Does a defective/poor quality Response affect the predictability of a Decision?	12 Does the issuing of a Reply affect the predictability of a Decision?	13 Does the issuing of a Rejoinder affect the predictability of a Decision?	Timescales associated with the Process	14 If the Responding party has only 7 days to furnish a Response what affect does that h	15 If the Referring Party grants an extension of time of 14 days, does that affect the pre	16 If the Referring Party refuses to grant an extension of time, does that affect the pred	17 If the parties jointly extend time, does that affect the predictability of a Decision?	18 Does the adjudicator having longer than 42 days to decide the dispute affect the pre	19 Does rendering a decision within 28 days affect the predictability of that Decision?	The Person	20 Does having the same professional background as the adjudicator affect the predicta	21 Does the fact that the decision maker is legally qualified (or not) affect the predictab	22 Does a proactive or passive approach affect the predictability of a Decision? PROAC	22 Does a proactive or passive approach affect the predictability of a Decision? PASSIV	23 Does potential 'customer building' to repeat adjudicator clients affect the predictabi	The dispute	24 In professional negligence disputes, does the profession of the adjudicator, being clo	25 Does the fact that a dispute is simple affect the predictability of a Decision?	26 Does the fact that a dispute is complex affect the predictability of a Decision?	27 Does the fact that a contract is verbal or part verbal affect the predictability of a Dec	The Parties or their Representatives	28 Does the fact that the adjudicator complained about the parties' submissions affect t	29 Does the furnishing of an expert report affect the predictability of a Decision?	30 Does the fact that a party referred the dispute affect the predictability of the Decisio	31 Does having the last word affect the predictability of a Decision?	32 Do further submissions by the parties affect the predictability of a Decision?	33 Does employing well-known construction lawyers affect the predictability of a Decisi	34 Does employing well-known claims consultants affect the predictability of a Decision	35 Does a party choosing not to be represented affect the predictability of a Decision?	total score	outcome	% Claimant was awarded	% Defendant was awarded
1C					1			-2				2	1	-1			0			-1				2	1		1	2														12	Claimant was successful	65	
1D					0			-2				-1	-1	1			2			2				-1	1																4	Defendant was not successful but paid less than claimed		35
2C					1							2	1	-1					1	-1				2			1	1										-2		2		1			-1	8	Claimant was successful	55	
2D					0							-1	-1	1					2	2				2			-1	2										-2		0		1			-1	5	Defendant was not successful but paid less than claimed		45
3C		-1			1	1						2	1	-1		1			1	-1				2			1	1								-1		2	1	1			-1	11	Claimant was successful	70	
3D		1			0	-1						-1	-1	1		-1			2	2				2			-1	2								-2		-2		0		1			-1	2	Defendant was not successful but paid less than claimed		30
4C					1							2					1					1		2	1		1												2				2	14	Claimant was entitrely successful	100	
4D					0							-1					-1					-1		2	2		-1										-2		0	1				0	Defendant was entirely unsuccessful		0
5C					1								1	-1						1				2			1	2												2	1	1			-1	11	Claimant and Defendant equally successful	50	
5D					0								-1	1						2				2			-1													0	1	1			-1	5	Claimant and Defendant equally successful		50
6C					1							2					1	0				1		2	1		1	2												2	1		1			16	Claimant was entirely successful	100	
6D					0						-1	-1					-1	2				-1		0	2		-1	2												0				2		4	Defendant was entirely unsuccessful		0
7C					1							2	1	-1						1	-1				1		1	2												2	1	1		2		14	Claimant was entirely successful	100	
7D					0							-1	-1	1						2	2				2		-1	2										-2		0		1				6	Defendant was entirely unsuccessful		0
8C												2	1	-1						1				2	1	1		2												2	1	1		2		16	Claimant was entirely successful	100	
8D								-2				-1	-1	1						2				2	2	2												-2		0		1	1			6	Defendant was entirely unsuccessful		0
9C		-1							-2				1	-1		1				1				2			1												2		1		2		8	Claimant was 45% succcessful	45	
9D		1							1				-1	1						2				2			-1	2										-2		0	1	1		2		10	Defendant was 55% Successful		55
10C			0		1						-1	2	1	-1						1	-1			2			1	2												2	1	1	1			13	Claimant was entirely successful	100	
10D			-1		0			-2			-1	-1	-1	1						2	2						-1	2										-2		0		1	1			1	Defendant was entirely unsuccessful		0
11C					1				-2			2					0							2			1	2										-2	2	2	1	1		2		13	The Claimant was successful (circa 80%)	80	
11D					0			-2	1			-1					2										-1	2										-2		0		1	1			2	The Defendant was largly unsuccessful		20
12C												2	1	-1						1				2	1		1	2												2		1			-1	12	The Claimant was entirely successful	100	
12D								-2				-1	-1	1						2					2		-1											-2		0	1	1			-1	0	The Defendant was entirely unsuccessful		0
13C					1				-2			2	1	-1							1			2	1		1	2										-2		2		1			-1	9	The Claimant was 75% Succcessful	75	
13D					0			-2	1			-1	-1	1								-1		2	2		-1	2										-2		0	1	1			-1	2	The Defendant was largely unsuccessful, succeeding in circa 25%		25
14C					1							2	1	-1						1				2			1	2												2		1		2		15	The Claimant was entirey successful	100	
14D					0							-1	-1	1						2				2			-1	2										-2		0	1	1		2		7	The Defendant was entirely unsuccessful		0
15C		-1			1				-2				1				0					1		2	1	1												-2		2		1	1			7	The Claimant was entirely unsuccessful	0	
15D		1			0			-2			-1		-1				2					-1		2	2	2														0	1	1		2		9	The Defendant was entirely successful		100
16C					1				-2				1	-1			0			1	-1			2		1		2										-2	2	2	1	1	1			10	The Claimant was entirely unsuccessful	0	
16D					0								-1	1			2			2	2			2		2		2											2	0		1		2		18	The Defendant was entirely successful		100
17C					1							2	1	-1		1	0							2		1		2												2		1		2		15	The Claimant was entirely successful	100	
17D					0			-2				-1	-1	1		-1	2							2		2		2										-2		0	1	1		2		7	The Defendant was entirely unsuccessful		0
18C						1	1		-2			2	1	-1			0								1		1	2										-2		2	1	1			-1	8	The Claimant Succeeded with 60% of the sum claimed	60	
18D						-1	0		1			-1	-1	1			2								2		-1											-2		0		1			-1	1	The Defendant was unsuccessful but paid less than claimed		40
19C					1				-2	-1		2	1	-1						1				2	1	1		2		2	1						-2		2		1				11	The Claimant succeeded but with only 35% of the sum claimed	35	
19D					0				1	-1	-1	-1	-1	1						2				2	2	2		2		2	1						-2		0	1	1				11	The Defendant suceeded in defending 65% of the sum claimed		65
20C					1							2						-1			1			2	1		1	2												2	1	1			-1	13	The Claimant was entirely successful	100	
20D					0					-1	-1	-1						0			-1			2	2		-1	2										-2		0					-1	-1	The Defendant was entirely unsuccessful		0
21C					1							2	1	-1			0							2	1		1	2												2	1	1		2		16	The Claimant succeeded with in excess of 80% of the claim	85	
21D					0						-1	-1	-1	1			2							2	2		-1	2										-2		0		1		2		7	The Defendant was unsuccessful but paid cira 15% less than claimed		15
22C					1							2	1	-1			0							2	1		1	2												2	1	1		2		16	The Claimant was entirely successful	100	
22D					0						-1	-1	-1	1			2							2	2		-1											-2		0		1	1			4	The Defendant was entirely unsuccessful		0
23C					1							2	1	-1						1				2			1											-2		2	1	1				10	The Claimant was entirely unsuccessful	0	
23D					0							-1	-1	1						2				2			-1	2											2	0		1	1			9	The Defendant was entirely successful		100
24C		-1			1				-2					-1						1	-1					1		2									-2		2		1		2		4	The Claimant was not successful only recovering 12% of the sums claimed	10	
24D		1			0				1					1						2	2					2											-2		0	1	1			-1	11	The Defendant was successful in paying only 12% of the sums claimed		90
25C				1					-2				1	-1						1	-1				1	1		2										-2		2		1	1			6	The Claimant was entirely unsuccessful	0	
25D				1					1				-1	1						2	2				2	2													2	0	1	1	1			18	The Defendant was entirely successful in defending the claim		100
26C				1								2	1	-1						1					1	1	1	2											2	2		1	1			16	The Claimant recovered 50% of the sum claimed	50	
26D				1				-2				-1	-1	1						2					2	2		2										-2	2	0	1	1	1			10	The Defendant paid only 50% of the sum claimed		50

Appendix 2 Explanatory Model Results

27C				1								2	1	-1					1	-1			2	1		1	2			1						2	1	1			-1	13	The Claimant was suceesful on reducing the sum due by 80%	80	
27D				1								-1	-1	1					2	2			2	2		-1	2			1				-2		0		1			-1	8	The Defendant recovered only 20% of the sum contra charged		20
28C					1								1	-1					1				2	1		1	2			1						2		1	1			13	The Claimant recovered 60% of the sum claimed	60	
28D					0								-1	1					2				2	2		-1	2			1					2	0	1	1	1			13	The Defendant paid only 40% of the sum claimed		40
29C					1				-2				1	-1			0		1					1	1		2			1					2	2	1	1				11	The Claimant was entirely unsuccessful	0	
29D					0			-2	1				-1	1			2		2					2	2		2			1				-2	2	0	1	1	1			13	The Defendant recovered 60% of their counterclaim		60
30C					1				-2				1	-1							1				1		2			1				-2		2					-1	3	The Claimant was entirely unsuccessful	0	
30D					0				1				-1	1							-1				2		2			1						0	1	1			-1	6	The Defendant paid nothing and recovered 100k. More than claimed by the Claimant who claimed 84k		100
31C					1							2	1								1					1	2			1						2	1			2		14	The Claimant was entirely successful	0	
31D					0							-1	-1								-1					-1	2			1				-2		0				2		-1	The Defendant was entirely unsuccessful		0
32C					1							2	1								1					1	2			1						2	1				-1	11	The Claimant was in excess of 95% successful	100	
32D					0							-1	-1								-1					-1	2			1				-2		0					-1	-4	The Defendant was entirely unsuccessful		0
33C					1							2									1					1	2			1						2	1	1	1			13	The Claimant was entirely successful	100	
33D					0							-1									-1					-1				1				-2		0		1			-1	-4	The Defendant was entirely unsuccessful		0
34C					1				-2				1	-1			0	-1							1					1		-1		-2		2					-1	-2	The Claimant was entirely unsuccessful	0	
34D					0			-2	1				-1	1			2	0							2		2			1						0	1	1			-1	7	The Defendant was entirely successful		100
35C					1							2	1	-1							1					1	2			1				-2		2	1	1			-1	9	The Claimant was 98% sucessful	100	
35D					0			-2				-1	-1	1							-1					-1	2			1						0		1			-1	-2	The Defendant was almost entirely unsuccessful		0
36C					1				-2			2	1				0									1	2			1				-2		2	1	1	1			9	The Claimant was successful in recovering in excess of 75% of the sum claimed	75	
36D					0			-2	1		-1	-1	-1				2									-1	2			1				-2		0		1	1			0	The Defendant was unsuccessful in its contra charges		25
37C					1							2	1								1					1	2			1				-2		2		1			-1	9	The Claimant was entirely successful	100	
37D					0			-2			-1	-1	-1								-1					-1				1						0	1	1			-1	-5	The Defendant was entirely unsuccessful		0
38C					1							2	1	-1							1					1	2			1						2		1	1			12	The Claimant was entirely successful	100	
38D					0			-2			-1	-1	-1	1							-1					-1				1				-2		0	1	1				-5	The Defendant was entirely unsuccessful		0
39C					1				-2				1	-1		1					1				1					1				-2		2	1	1	1			6	The Claimant recovered only 10% of the sum claimed	10	
39D					0				1				-1	1		-1					-1				2					1						0		1	1			4	The Defendant resisted 90% of the sum claimed		90
40C				1								2									1					1	2			1						2	1	1	1	2		15	The Claimant recovered 75% of the sum claimed	75	
40D				1						-1	-1	-1									-1					-1				1				-2		0						-5	The Defendant was unsuccessful, going into liquidation		25
41C		-1	0		1				-2				1	-1							1			1	1					1				-2		2		1	1			4	The Claimant was entirely unsuccessful	0	
41D		1	-1		0			-2	1				-1	1							-1			2	2					1						0	1	1	1			6	The Defendant was entirely successful		100
42C					1							2	1								1			1		1				1					2	2		1		2		15	The Claimant was entirely successful	100	
42D					0							-1	-1								-1			2		-1				1				-2		0	1	1				-1	The Defendant was entirely unsuccessful		0
43C		-1	0		1				-2				1	-1			0								1					1				-2		2		1		2		3	The Claimant was entirely unsuccessful	0	
43D		1	-1		0				1				-1	1			2								2		2			1						0	1	1	1			11	The Defendant was entirely successful		100
44C					1				-2		-1		1	-1			0		1					1	1		2			1				-2		2		1		2		7	The Claimant was entirely unsuccessful	0	
44D					0				1				-1	1			2		2					2	2		2			1					2	0	1	1		2		18	The Defendant has succesful defended the claim and is entitled to a payment for abatement		100
45C					1				-2				1	-1			0						2	1		1				1				-2		2	1	1		2		8	The Claimant only recovered 25% of the sum claimed	25	
45D					0				1				-1	1			2						2	2		-1	2			1						0	1	1	1			12	The Defendant successfuly resisted 75% of the sum claimed		75
46C					1				-2			2	1	-1							1			1		1	2			1						2	1	1		2		13	The Claimant recovered in excess of 80% of the sum claimed	80	
46D					0				1			-1	-1	1							-1			2		-1	2			1				-2		0	1	1			-1	2	The Defendant was entirely unsuccessful in its counterclaim		20
47C					1				-2				1	-1							1			1	1		2			1				-2		2		1		2		8	The Claimant was entirely unsuccessful	0	
47D					0				1				-1	1							-1			2	2		2			1						0	1	1	1			10	The Defendant was entirely successful		100
48C					1				-2				1	-1					1					1	1		2			1				-2		2		1			-1	5	The Claimant Recovered less than 20% of the sum claimed	20	
48D					0			-2	1				-1	1					2					2	2		2			1						0	1	1			-1	9	The Defendant successfully resisted 80% of the sum claimed		80
49C			0		1							2	1	-1			0						2	1		1	2			1						2	1	1	1			15	The Claimant Recovered in excess of 75% of the sum claimed	75	
49D			-1		0			-2				-1	-1	1			2						2	2		-1				1				-2		0		1	1			2	The Defendant was entirely unsuccessful		0
50C				1								2	1	-1					1				2	1	1		2			1				-2	2	2	1	1		2		17	The Clamant recovered 50% of the sum claimed	50	
50D				1								-1	-1	1					2				2	2	2					1				-2	2	0		1	1			11	The Defendant recovered 30% of the sum it claimed		50

Appendix 3 Predictive Model Results

Decision	The Process	1 Does a defective Notice of Adjudication affect predictability of a Decision?	2 Does an objection to jurisdiction based upon a defective Notice of Adjudication affect	3 If an adjudicator is named in the Contract does that affect the predictability of a Decis	4 Does having the right to select a particular Adjudicator Nominating Body affect the pr	5 Does requesting a particular adjudicator or group of adjudicators affect the predictab	6 Does a party excluding adjudicators affect the predictability of a Decision from an adj	7 Does objecting to jurisdiction affect the predictability of a Decision?	8 Does a defective/poor quality Referral Notice affect the predictability of a Decision?	9 Does compliance or non-compliance with Directions affect the predictability of a Deci	10 Does belated compliance with Directions affect the predictability of a Decision?	11 Does a defective/poor quality Response affect the predictability of a Decision?	12 Does the issuing of a Reply affect the predictability of a Decision?	13 Does the issuing of a Rejoinder affect the predictability of a Decision?	Timescales associated with the Process	14 If the Responding party has only 7 days to furnish a Response what affect does that	15 If the Referring Party grants an extension of time of 14 days, does that affect the pre	16 If the Referring Party refuses to grant an extension of time, does that affect the pred	17 If the parties jointly extend time, does that affect the predictability of a Decision?	18 Does the adjudicator having longer than 42 days to decide the dispute affect the pr	19 Does rendering a decision within 28 days affect the predictability of that Decision?	The Person	20 Does having the same professional background as the adjudicator affect the predict	21 Does the fact that the decision maker is legally qualified (or not) affect the predictab	22 Does a proactive or passive approach affect the predictability of a Decision? PROAC	22 Does a proactive or passive approach affect the predictability of a Decision? PASSIV	23 Does potential 'customer building' to repeat adjudicator clients affect the predictabi	The dispute	24 In professional negligence disputes, does the profession of the adjudicator, being clo	25 Does the fact that a dispute is simple affect the predictability of a Decision?	26 Does the fact that a dispute is complex affect the predictability of a Decision?	27 Does the fact that a contract is verbal or part verbal affect the predictability of a Dec	The Parties or their Representatives	28 Does the fact that the adjudicator complained about the parties' submissions affect	29 Does the furnishing of an expert report affect the predictability of a Decision?	30 Does the fact that a party referred the dispute affect the predictability of the Decisio	31 Does having the last word affect the predictability of a Decision?	32 Do further submissions by the parties affect the predictability of a Decision?	33 Does employing well-known construction lawyers affect the predictability of a Decis	34 Does employing well-known claims consultants affect the predictability of a Decisior	35 Does a party choosing not to be represented affect the predictability of a Decision?	total score	outcome	% Claimant was awarded	% Defendant was awarded	
1C					1			-2				2	1	-1			0				-1			2	1			1	2			1						2		1		2		-1	12	Claimant was successful	65		
1D					0			-2				-1	-1	1			2				2				2			-1	1			1						0		1				-1	4	Defendant was not successful but paid less than claimed		35	
2C					1							2	1	-1					1	-1				2				1	1			1						-2		2		1		-1	8	Claimant was successful	55		
2D					0							-1	-1	1					2	2				2				-1	2			1						-2		0		1		-1	5	Defendant was not successful but paid less than claimed		45	
3C		-1			1	1						2	1	-1		1			1	-1				2				1	1			1		-1						2	1	1		-1	11	Claimant was successful	70		
3D		1			0	-1						-1	-1	1		-1			2	2				2				-1	2			1		-2		-2		0		1				-1	2	Defendant was not successful but paid less than claimed		30	
4C					1							2					1						1	2	1		1				1						2				2			14	Claimant was entitrely successful	100		
4D					0							-1					-1					-1		2	2		-1								-2		0	1						0	Defendant was entirely unsuccessful		0	
5C					1								1	-1						1				2				1	2			1						2	1	1			-1	11	Claimant and Defendant equally successful	50		
5D					0								-1	1						2				2				-1				1						0	1	1			-1	5	Claimant and Defendant equally successful		50	
6C					1							2				1					1			2	1			1	2			1						2	1		1			16	Claimant was entirely successful	100		
6D					0						-1	-1				-1	2				-1			0	2			-1	2			1						0				2			4	Defendant was entirely unsuccessful		0	
7C					1							2	1	-1					1	-1					1			1	2			1						2	1	1		2		14	Claimant was entirely successful	100		
7D					0							-1	-1	1					2	2					2			-1	2			1						-2		0		1			6	Defendant was entirely unsuccessful		0	
8C												2	1	-1					1					2	1	1		2			1								2	1	1		2		16	Claimant was entirely successful	100		
8D								-2				-1	-1	1					2					2	2	2					1						-2		0		1	1			6	Defendant was entirely unsuccessful		0	
9C		-1							-2				1	-1		1			1					2			1					1								2		1		2		8	Claimant was 45% succcessful	45		
9D		1							1				-1	1					2					2			-1	2			1						-2		0	1	1		2		10	Defendant was 55% Successful		55	
10C			0		1						-1	2	1	-1					1	-1				2				1	2			1								2	1	1	1			13	Claimant was entirely successful	100		
10D			-1		0			-2			-1	-1	-1	1					2	2								-1	2			1						-2		0		1	1			1	Defendant was entirely unsuccessful		0	
11C					1				-2			2					0						2				1	2			1						-2	2	2	1	1		2		13	The Claimant was successful (circa 80%)	80		
11D					0			-2	1			-1					2										-1	2			1						-2		0		1	1			2	The Defendant was largly unsuccessful		20	
12C												2	1	-1					1					2	1			1	2			1								2		1			-1	12	The Claimant was entirely successful	100		
12D								-2				-1	-1	1					2						2			-1				1						-2		0	1	1			-1	0	The Defendant was entirely unsuccessful		0	
13C					1				-2			2	1	-1							1			2	1			1	2			1						-2		2		1		-1	9	The Claimant was 75% Succcessful	75		
13D					0			-2	1			-1	-1	1							-1			2	2			-1	2			1						-2		0	1	1			-1	2	The Defendant was largely unsuccessful, succeeding in circa 25%		25	
14C					1							2	1	-1					1					2				1	2			1								2		1		2		15	The Claimant was entirey successful	100		
14D					0							-1	-1	1					2					2				-1	2			1						-2		0	1	1		2		7	The Defendant was entirely unsuccessful		0	
15C		-1			1				-2				1				0				1			2	1	1						1						-2		2		1	1			7	The Claimant was entirely unsuccessful	0		
15D		1			0			-2			-1		-1				2				-1			2	2	2						1								0	1	1		2		9	The Defendant was entirely successful		100	
16C					1				-2				1	-1			0		1	-1				2		1			2			1						-2	2	2	1	1	1			10	The Claimant was entirely unsuccessful	0		
16D					0								-1	1			2		2	2				2		2			2			1							2	0		1		2		18	The Defendant was entirely successful		100	
17C					1							2	1	-1		1	0							2		1			2			1								2		1		2		15	The Claimant was entirely successful	100		
17D					0			-2				-1	-1	1		-1	2							2		2			2			1						-2		0	1	1		2		7	The Defendant was entirely unsuccessful		0	
18C						1	1		-2			2	1	-1			0								1			1	2			1						-2		2	1	1			-1	8	The Claimant Succeeded with 60% of the sum claimed	60		
18D						-1	0		1			-1	-1	1			2								2			-1				1						-2		0		1			-1	1	The Defendant was unsuccessful but paid less than claimed		40	
19C					1				-2	-1		2	1	-1					1					2	1	1		2		2	1						-2		2		1				11	The Claimant succeeded but with only 35% of the sum claimed	35		
19D					0				1	-1	-1	-1	-1	1					2					2	2	2		2	2	1						-2		0	1	1				11	The Defendant suceeded in defending 65% of the sum claimed		65	
20C					1							2						-1		1				2	1			1	2			1								2	1	1			-1	13	The Claimant was entirely successful	100		
20D					0					-1	-1	-1						0			-1			2	2			-1	2			1						-2		0				-1	-1	The Defendant was entirely unsuccessful		0	
21C					1							2	1	-1			0							2	1			1	2			1								2	1	1		2		16	The Claimant succeeded with in excess of 80% of the claim	85		
21D					0						-1	-1	-1	1			2				-1			2	2			-1	2			1						-2		0		1		2		7	The Defendant was unsuccessful but paid cira 15% less than claimed		15	
22C					1							2	1	-1			0							2	1			1	2			1								2	1	1		2		16	The Claimant was entirely successful	100		
22D					0						-1	-1	-1	1			2							2	2			-1				1						-2		0		1	1			4	The Defendant was entirely unsuccessful		0	
23C					1							2	1	-1					1					2				1				1						-2		2	1	1				10	The Claimant was entirely unsuccessful	0		
23D					0							-1	-1	1					2					2				-1	2			1							2	0		1	1			9	The Defendant was entirely successful		100	
24C		-1			1				-2					-1					1	-1						1		2			1						-2		2		1		2		4	The Claimant was not successful only recovering 12% of the sums claimed	10		
24D		1			0				1					1					2	2						2						1							0	1	1			-1	11	The Defendant was successful in paying only 12% of the sums claimed		90	
25C				1					-2				1	-1					1	-1					1	1		2			1						-2		2		1	1			6	The Claimant was entirely unsuccessful	0		
25D				1					1				-1	1					2	2					2	2		2			1							2	0	1	1	1			18	The Defendant was entirely successful in defending the claim		100	
26C				1								2	1	-1					1						1	1	1	2			1							2	2		1	1			16	The Claimant recovered 50% of the sum claimed	50		
26D				1				-2				-1	-1	1					2						2	2		2			1						-2	2	0	1	1	1			10	The Defendant paid only 50% of the sum claimed		50	
27C				1								2	1	-1					1	-1				2	1			1	2			1								2	1	1			-1	13	The Claimant was suceesful on reducing the sum due by 80%	80		
27D				1								-1	-1	1					2	2				2	2			-1	2			1						-2		0		1			-1	8	The Defendant recovered only 20% of the sum contra charged		20	
28C					1								1	-1					1					2	1			1	2			1								2		1	1			13	The Claimant recovered 60% of the sum claimed	60		

Appendix 3 Predictive Model Results

28D					0								-1	1					2				2	2		-1	2			1					2	0	1	1	1			13	The Defendant paid only 40% of the sum claimed		40	
29C					1				-2				1	-1			0		1					1	1		2			1					2	2	1	1				11	The Claimant was entirely unsuccessful	0		
29D					0			-2	1				-1	1			2		2					2	2		2			1				-2	2	0	1	1	1			13	The Defendant recovered 60% of their counterclaim		60	
30C					1				-2				1	-1							1				1		2			1				-2		2					-1	3	The Claimant was entirely unsuccessful	0		
30D					0				1				-1	1							-1				2		2			1						0	1	1			-1	6	The Defendant paid nothing and recovered 100k. More than claimed by the Claimant who claimed 84k		100	
31C					1							2	1								1					1	2			1						2	1			2		14	The Claimant was entirely successful	0		
31D					0							-1	-1								-1					-1	2			1				-2		0				2		-1	The Defendant was entirely unsuccessful		0	
32C					1							2	1								1					1	2			1						2	1				-1	11	The Claimant was in excess of 95% successful	100		
32D					0							-1	-1								-1					-1	2			1				-2		0					-1	-4	The Defendant was entirely unsuccessful		0	
33C					1							2									1					1	2			1						2	1	1	1			13	The Claimant was entirely successful	100		
33D					0							-1									-1					-1				1				-2		0		1			-1	-4	The Defendant was entirely unsuccessful		0	
34C					1				-2				1	-1			0	-1							1					1		-1		-2		2					-1	-2	The Claimant was entirely unsuccessful	0		
34D					0			-2	1				-1	1			2	0							2		2			1						0	1	1			-1	7	The Defendant was entirely successful		100	
35C					1							2	1	-1							1					1	2			1				-2		2	1	1			-1	9	The Claimant was 98% sucessful	100		
35D					0			-2				-1	-1	1							-1					-1	2			1						0		1			-1	-2	The Defendant was almost entirely unsuccessful		0	
36C					1				-2			2	1				0									1	2			1				-2		2	1	1	1			9	The Claimant was successful in recovering in excess of 75% of the sum claimed	75		
36D					0			-2	1		-1	-1	-1				2									-1	2			1				-2		0		1	1			0	The Defendant was unsuccessful in its contra charges		25	
37C					1							2	1								1					1	2			1				-2		2		1			-1	9	The Claimant was entirely successful	100		
37D					0			-2			-1	-1	-1								-1					-1				1						0	1	1			-1	-5	The Defendant was entirely unsuccessful		0	
38C					1							2	1	-1							1					1	2			1						2		1	1			12	The Claimant was entirely successful	100		
38D					0			-2			-1	-1	-1	1							-1					-1				1				-2		0	1	1				-5	The Defendant was entirely unsuccessful		0	
39C					1				-2				1	-1		1					1				1					1				-2		2	1	1	1			6	The Claimant recovered only 10% of the sum claimed	10		
39D					0				1				-1	1		-1					-1				2					1						0		1	1			4	The Defendant resisted 90% of the sum claimed		90	
40C				1								2									1					1	2			1						2	1	1	1	2		15	The Claimant recovered 75% of the sum claimed	75		
40D				1						-1	-1	-1									-1					-1				1				-2		0						-5	The Defendant was unsuccessful, going into liquidation		25	
41C		-1	0		1				-2				1	-1							1			1	1					1				-2		2		1	1			4	The Claimant was entirely unsucessful	0		
41D		1	-1		0			-2	1				-1	1							-1			2	2					1						0	1	1	1			6	The Defendant was entirely successful		100	
42C					1							2	1								1			1		1				1					2	2		1		2		15	The Claimant was entirely successful	100		
42D					0							-1	-1								-1			2		-1				1				-2		0	1	1				-1	The Defendant was entirely unsuccessful		0	
43C		-1	0		1				-2				1	-1			0								1					1				-2		2		1		2		3	The Claimant was entirely unsuccessful	0		
43D		1	-1		0				1				-1	1			2								2		2			1						0	1	1	1			11	The Defendant was entirely successful		100	
44C					1				-2		-1		1	-1			0		1					1	1		2			1				-2		2		1		2		7	The Claimant was entirely unsuccessful	0		
44D					0				1				-1	1			2		2					2	2		2			1					2	0	1	1		2		18	The Defendant has succesful defended the claim and is entitled to a payment for abatement		100	
45C					1				-2				1	-1			0						2	1		1				1				-2		2	1	1		2		8	The Claimant only recovered 25% of the sum claimed	25		
45D					0				1				-1	1			2						2	2		-1	2			1						0	1	1	1			12	The Defendant successfuly resisted 75% of the sum claimed		75	
46C					1				-2			2	1	-1							1			1		1	2			1						2	1	1		2		13	The Claimant recovered in excess of 80% of the sum claimed	80		
46D					0				1			-1	-1	1							-1			2		-1	2			1				-2		0	1	1			-1	2	The Defendant was entirely unsuccessful in its counterclaim		20	
47C					1				-2				1	-1							1			1	1		2			1				-2		2		1		2		8	The Claimant was entirely unsuccessful	0		
47D					0				1				-1	1							-1			2	2		2			1						0	1	1	1			10	The Defendant was entirely successful		100	
48C					1				-2				1	-1					1					1	1		2			1				-2		2		1			-1	5	The Claimant Recovered less than 20% of the sum claimed	20		
48D					0			-2	1				-1	1					2					2	2		2			1						0	1	1			-1	9	The Defendant successfully resisted 80% of the sum claimed		80	
49C			0		1							2	1	-1			0						2	1		1	2			1						2	1	1	1			15	The Claimant Recovered in excess of 75% of the sum claimed	75		
49D			-1		0			-2				-1	-1	1			2						2	2		-1				1				-2		0		1	1			2	The Defendant was entirely unsuccessful		0	
50C				1								2	1	-1					1				2	1	1		2			1				-2	2	2	1	1		2		17	The Clamant recovered 50% of the sum claimed	50		
50D				1								-1	-1	1					2				2	2	2					1				-2	2	0		1	1			11	The Defendant recovered 30% of the sum it claimed		50	
51C					1				-2				1	-1							1				1		2			1				-2		2	1	1	1			7	The Claimant recovered only 25% of the sum claimed.	25		
51D					0				1				-1	1							-1				2		2			1						0		1		2		8	The Defendant successfully resisted 75% of the sum claimed		75	
52C				1								2	1	-1							1		2	1	1		2			1						2	1	1			-1	14	The Claimant recovered 65% of the sum claimed	65		
52D				1								-1	-1	1							-1		2	2	2		2			1				-2		0	1	1			-1	7	The Defendant resisted 35% of the sum claimed		35	
53C				1								2	1	-1					1				2	1	1		2			1						2	1	1			-1	14	The Claimant recovered 70% of the sum claimed	70		
53D				1								-1	-1	1					2				2	2	2		2			1				-2		0		1			-1	9	The Defendant paid 30% less than claimed		30	
54C					1				-2			2	1	-1							1		2			1				1				-2		2	1	1				8	The Claimant was 0% Successful. HOWEVER THE ADJUDICATORS ANALYSIS OF THE LAW WAS WRONG	0		
54D					0				1			-1	-1	1							-1		2			-1	2			1						0		1			-1	3	The Defendant resisted 100% of the claim.		100	
55C					1							2	1	-1			0						2			1	2			1						2		1		2		14	The Claimant was 100% Successful	100		
55D					0			-2			-1	-1	-1	1			2									-1				1				-2		0	1	1				-2	The Defendantwas entirely unsuccessful		0	
56C					1		1		-2				1	-1					1	-1			2	1	1		2			1						2	1	1	1	2		14	The Claimant recovered 60% of the sum claimed	60		
56D					0		0	-2	1		-1		-1	1					2	2			2	2	2		2			1				-2		0		1	1			11	The Defendant resisted 40% of the sum claimed		40	
57C					1							2	1	-1			0	-1					2	1	1		2			1						2		1				12	The Claimant recovered 85% of the sum claimed	85		
57D					0			-2			-1	-1	-1	1			2	0						2	2					1				-2		0	1	1			-1	2	The respondent resisted only 15% of the sum claimed		15	
58C					1							2	1						1				2		1		2			1						2	1	1			-1	14	The Claimant recovered 90% of the sum claimed	90		
58D					0							-1	-1						2				2		2		2			1				-2		0		1			-1	5	The Defendant Resisted only 10% of the sum claimed		10	
59C					1				-2				1	-1							1			1	1					1		-1		-2	2	2	1	1	1			7	The Clamant as only circa 10% sucessful	10		
59D					0				1				-1	1							-1		2	2	2		2			1		-1				0		1			-1	8	The Defendant successful resisted 90% of the claim		90	
60C					1				-2			2	1	-1					1	-1				1		1				1				-2		2		1				5	The Claiman was 40% unsuccessful	40		
60D					0			-2	1			-1	-1	1					2	2			2	2		-1	2			1				-2		0	1	1		2		10	The Defendant was 60% Successful in its claim		60	
61C		-1	0		1							2	1						1		1		2			1	2			1						2		1				14	The Claimant was circa 75% Successful	75		
61D		1	-1		0							-1	-1						2				2			-1	2			1				-2		0	1	1	1	2		7	The Defendant resisted circa 25% of the sum claimed		25	
62C					1	1	1					2	1	-1					1	-1			2	1	1		2				-1					2		1		2		15	The Claimant recovered 65% of the sum claimed	65		
62D					0	-1	0	-2			-1	-1	-1	1					2	2				2	2		2				-2			-2	2	0	1	1				5	The Defendant resisted 35% of the sum claimed		35	
63C				1								2	1	-1					1	-1			2		1		2			1						2		1		2		14	The Claimant recovered 80% of the sum claimed	80		
63D				1				-2			-1	-1	-1	1					2	2					2		2			1				-2		0	1	1				6	The Defendant reisted 20% of the sum claimed		20	
64C					1							2	1	-1					1	-1			2	1	1		2				-1					2	1	1			-1	11	The Claimant recovered 90% of the sum claimed	90		
64D					0							-1	-1	1					2	2				2	2						-2			-2	2	0	1	1			-1	6	The Defendant resisted 10% of the sum claimed		10	
65C					1				-2	-1		2	1				0						2	1		1	2		2		-1					2	1			2		13	The Claimant was 90% successful	90		
65D					0			-2	1	-1	-1	-1	-1				2						2	2		-1					-2			-2		0					-1	-5	The Defendant resisted only 10% of the sum claimed		10	
66C					1							2	1	-1					1	-1			2	1	1						-1					2			1	2	-1	10	The Claimant was 70% successful	70		
66D					0			-2				-1	-1	1					2	2			2	2	2						-2			-2		0	1		1		-1	4	The Defendant resitsed 30% of the sum claimed		30	
67C					1							2	1						1				2		1		2			1						2	1	1			-1	14	The Claimant recovered 90% of the sum claimed	90		67
67D					0							-1	-1						2				2		2		2			1				-2		0		1			-1	5	The Defendant resisted only 10% of the sum claimed		10	
68C				1								2	1	-1							1		2	1	1		2			1						2	1	1		2		14	The Claimant recovered 65% of the sum claimed	65		
68D				1								-1	-1	1							-1		2	2	2		2			1				-2		0	1	1	1			7	The Defendant resisted 35% of the sum claimed		35	
69C					1							2				1					1		2	1	1					1						2				2		14	Claimant was entirely successful	100		

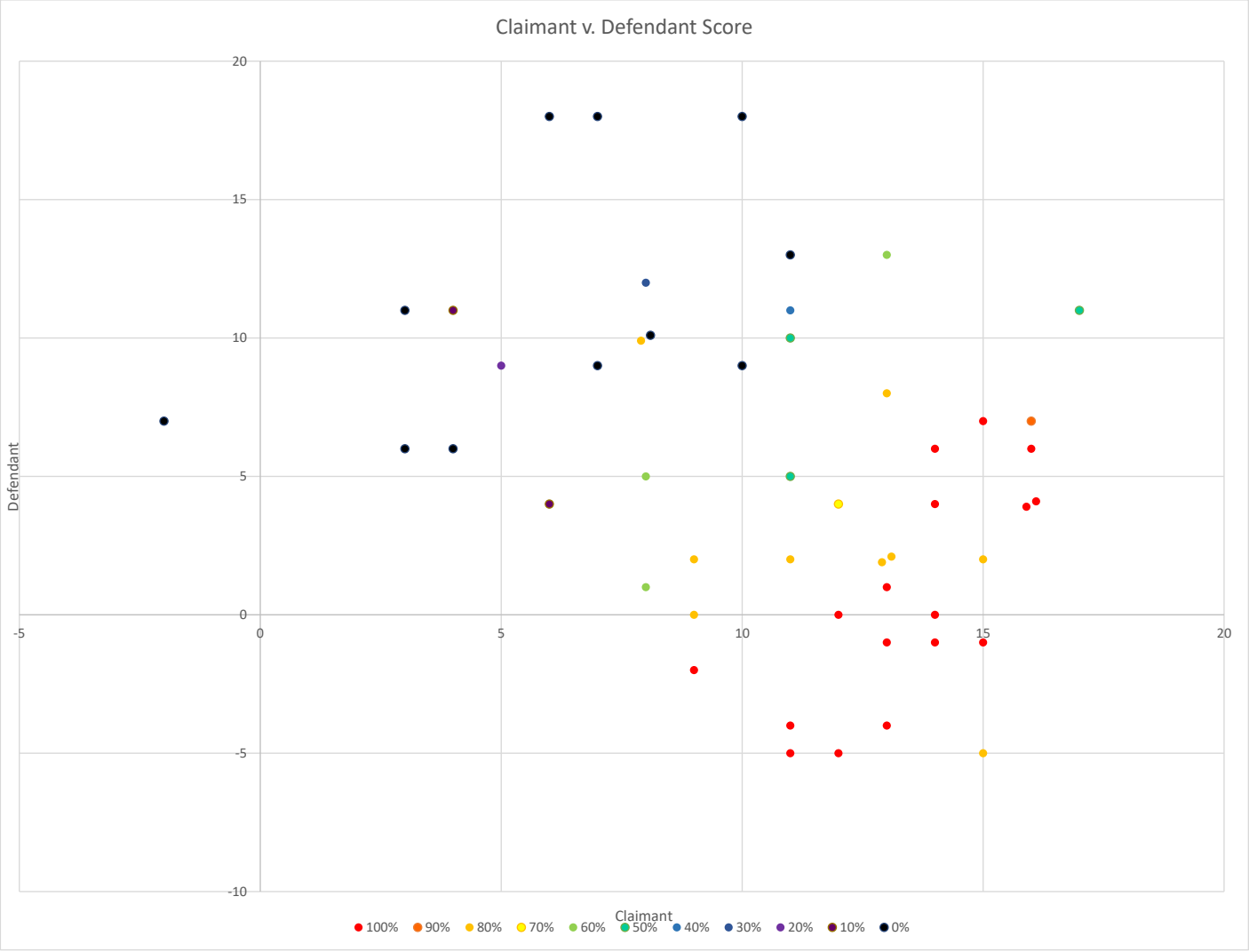
Appendix 3   Predictive Model Results

69D					0							-1				-1					-1		2	2	2					1				-2		0	1					3	Defendant was entirely unsuccessful		0	
70C					1				-2			2	1				0									1	2			1				-2		2	1	1	1	2		11	The Claimant was successful in recovering 75% of the sum claimed	75		70
70D					0			-2	1		-1	-1	-1				2									-1	2			1				-2		0		1	1			0	The Defendant was unsuccessful in its contra charges		25	
71C				1								2	1	-1					1				2	1		1	2			1				-2	2	2	1	1		2		17	The Clamant recovered 50% of the sum claimed	50		
71D				1								-1	-1	1					2				2	2		-1				1				-2	2	0		1	1			8	The Defendant recovered 30% of the sum it claimed		50	
72C						1	1		-2			2	1	-1			0							1	1		2			1				-2		2	1	1			-1	8	The Claimant succeeded with 60% of the sum claimed	60		
72D						-1	0		1			-1	-1	1			2							2	2					1				-2		0		1			-1	4	The Defendant was unsuccessful but paid less than claimed		40	
73C		-1			1				-2				1				0				1			1	1					1				-2		2		1	1			5	The Claimant was entirely unsuccessful	0		
73D		1			0			-2			-1		-1				2				-1		2	2	2					1						0	1	1		2		9	The Defendant was entirely successful		100	
74C					1							2	1	-1			0	-1					2	1	1		2			1						2		1	2			14	The Claimant recovered 80% of the sum claimed	80		
74D					0			-2			-1	-1	-1	1			2	0						2	2					1				-2		0	1	1			-1	2	The Defendant resisted only 20% of the sum claimed		20	
75C					1							2									1				1		2			1						2	1	1	1			13	The Claimant was entirely successful	100		
75D					0							-1									-1				2					1				-2		0		1			-1	-1	The Defendant was entirely unsuccessful		0	
76C					1				-2				1	-1					1					1	1		2			1				-2		2		1	1			7	The Claimant recovered 20% of the sum claimed	20		
76D					0			-2	1				-1	1					2					2	2		2			1						0	1	1		2		12	The Defendant successfully resisted 80% of the sum claimed		80	
77C					1							2				1	0				1		2	1	1		2			1						2	1		1			16	Claimant was entirely successful	100		
77D					0					-1	-1				-1	2				-1		0	2	2		2			1						0			1			6	Defendant was entirely unsuccessful		0	
78C					1		1		-2				1	-1					1	-1			2	1		1	2			1						2	1	1	1	2		14	The Claimant recovered 60% of the sum claimed	60		78
78D					0		0	-2	1		-1		-1	1					2	2			2	2		-1	2			1				-2		0		1	1			8	The Defendant resisted 40% of the sum claimed		40	
79C					1				-2			2	1	-1					1	-1				1		1				1				-2		2		1				5	The Claimant was 40% unsuccessful	40		79
79D					0			-2	1			-1	-1	1					2	2			2	2		-1	2			1				-2		0	1	1		2		10	The Defendant was 60% successful in its claim		60	
80C					1							2	1	-1					1				2			1	2			1						2		1		2		15	The Claimant was entirey successful	100		
80D					0							-1	-1	1					2				2			-1	2			1				-2		0	1	1	1			6	The Defendant was entirely unsuccessful		0	
81C					1							2	1								1				1		2			1						2	1			2		14	The Claimant was entirely successful	100		
81D					0							-1	-1								-1				2		2			1				-2		0				2		2	The Defendant was entirely unsuccessful		0	
82C					1							2	1	-1							1				1		2			1						2		1	1			12	The Claimant was entirely successful	100		
82D					0			-2			-1	-1	-1	1							-1				2					1				-2		0	1	1	1			-1	The Defendant was entirely unsuccessful		0	
83C		-1	0		1				-2				1	-1							1			1	1					1				-2		2		1	1			4	The Claimant was entirely unsucessful	0		
83D		1	-1		0			-2	1				-1	1							-1			2	2					1						0	1	1		2		7	The Defendant was entirely successful		100	
84C					1				-2				1	-1			0	-1						1	1					1	-1			-2		2					-1	-1	The Claimant was entirely unsuccessful	0		
84D					0			-2	1				-1	1			2	0						2	2		2			1						0	1	1			-1	9	The Defendant was entirely successful		100	
85C					1							2						-1			1		2	1		1	2			1						2	1	1	1			15	The Claimant was entirely successful	100		
85D					0					-1	-1	-1						0			-1		2	2		-1	2			1				-2		0			1			1	The Defendant was entirely unsuccessful		0	
86C					1				-2	-1		2	1	-1					1				2	1	1		2		2	1				-2		2		1				11	The Claimant succeeded but with only 35% of the sum claimed	35		
86D					0				1	-1	-1	-1	-1	1					2				2	2	2		2		2	1				-2		0	1	1	1			12	The Defendant succeeded in defending 65% of the sum claimed		65	
87C					1							2	1	-1							1				1		2			1				-2		2	1	1			-1	9	The Claimant was 98% sucessful	100		
87D					0			-2				-1	-1	1							-1				2		2			1						0		1			-1	1	The Defendant was almost entirely unsuccessful		0	
88C				1								2	1	-1					1	-1			2			1	2			1						2	1	1			-1	12	The Claimant was 80% successful	80		
88D				1								-1	-1	1					2	2			2			-1	2			1				-2		0		1			-1	6	The Defendant was 20% successful		20	
89C					1							2	1	-1		1	0						2			1	2			1						2		1		2		15	The Claimant was entirely successful	100		
89D					0			-2				-1	-1	1		-1	2						2			-1	2			1				-2		0	1	1		2		4	The Defendant was entirely unsuccessful		0	
90C				1								2	1	-1					1				2	1		1	2			1						2	1	1			-1	14	The Claimant recovered 70% of the sum claimed	70		
90D				1								-1	-1	1					2				2	2		-1	2			1				-2		0		1			-1	9	The Defendant resisted 30% of the sum claimed		30	
91C					1							2	1	-1					1	-1			2			1	1			1				-2		2		1			-1	8	Claimant was successful with 55% of the claim	55		
91D					0							-1	-1	1					2	2			2			-1	2			1				-2		0		1			-1	5	Defendant resisted 45% of the claim		45	
92C					1				-2			2	1	-1							1					1	2			1						2	1	1		2		12	The Claimant recovered 80% of the sum claimed	80		
92D					0				1			-1	-1	1							-1					-1	2			1				-2		0	1	1			-1	0	The Defendant resisted only 20% of the sum claimed		20	
93C												2	1	-1					1	-1			2			1	2			1						2		1		2		13	The Claimant recovered 80% of the sum claimed	80		
93D								-2			-1	-1	-1	1					2	2						-1	2			1				-2		0	1	1				2	The Defendant resisted 20% of the sum claimed		20	
94C					1				-2				1	-1			0		1	-1			2	1	1		2			1				-2	2	2	1	1	1			11	The Claimant was entirely unsuccessful	0		
94D					0								-1	1			2		2	2			2	2	2		2			1					2	0		1		2		20	The Defendant was entirely successful		100	
95C		-1	0		1				-2				1	-1			0								1					1				-2		2		1				1	The Claimant was 0% successful	0		
95D		1	-1		0				1				-1	1			2								2		2			1						0	1	1	1			11	The Defendant was 100% successful		100	
96C					1							2	1								1					1				1						2	1				-1	9	The Claimant was 95% successful	95		
96D					0							-1	-1								-1					-1				1				-2		0					-1	-6	The Defendant was 5% successful		5	
97C		-1							-2				1	-1		1			1				2			1				1						2		1		2		8	Claimant was 45% successful	45		
97D		1							1				-1	1					2				2			-1	2			1				-2		0	1	1		2		10	Defendant was 55% successful		55	
98C					1				-2				1	-1					1				2			1				1				-2		2	1	1				6	The Claimant was 0~~%~~ unsuccessful	0		
98D					0				1				-1	1					2				2			-1	2			1					2	0		1	1			11	The Defendant was 100% successful		100	
99C					1								1	-1					1				2		1		2			1						2	1	1			-1	11	Claimant was 75% successful	75		
99D					0								-1	1					2				2		2					1						0	1	1			-1	8	Defendant was 25% successful		25	
100C			0		1							2	1	-1			0						2	1	1		2			1						2	1	1	1			15	The Claimant was 75% sucessful	75		
100D			-1		0			-2				-1	-1	1			2						2	2	2					1				-2		0		1	1			5	The Defendant was 25% successful		25	
101C		-1	0		1							2	1						1		1		2			1	2			1						2		1		2		16	The Claimant was 75% successful	75		
101D		1	-1		0							-1	-1						2				2			-1	2			1				-2		0	1	1	1			5	The Defendant 25% sucessful		25	
102C			0		1						-1	2	1	-1					1	-1			2		1		2			1						2	1	1	1			13	Claimant was 100~~%~~ successful	100		
102D			-1		0			-2			-1	-1	-1	1					2	2					2		2			1				-2		0		1	1			4	Defendant was 0% Successful		0	
103C				1					-2				1	-1					1	-1				1		1	2			1				-2		2		1	1			6	The Claimant was 0% Successful	0		
103D				1					1				-1	1					2	2				2		-1	2			1					2	0	1	1	1			15	The Defendant was 100% sucessful		100	
104C					1							2	1	-1					1	-1				1		1	2			1						2	1	1		2		14	Claimant was 100% successful	100		
104D					0							-1	-1	1					2	2				2		-1	2			1				-2		0		1				6	Defendant was 0% successful		0	
105C					1				-2			2	1	-1							1		2	1		1	2			1				-2		2		1		2		12	The Claimant was 75% successful	75		
105D					0			-2	1			-1	-1	1							-1		2	2		-1	2			1				-2		0	1	1				3	The Defendant was 25% successful		25	
106C					1				-2		-1		1	-1			0		1						1		2			1				-2		2		1		2		6	The Claimant was 0% successful	0		
106D					0				1				-1	1			2		2						2		2			1					2	0	1	1		2		16	The Defendant was 100% successful		100	
107C					1								1	-1					1				2	1		1	2			1						2		1	1			13	The Claimant was 60% successful	60		
107D					0								-1	1					2				2	2		-1	2			1				-2	2	0	1	1	1			11	The Defendant was 40% successful		40	
108C					1				-2				1	-1							1			1	1		2			1				-2		2					-1	4	The Claimant was 0% successful	0		
108D					0				1				-1	1							-1			2	2		2			1						0	1	1			-1	8	The Defendant was 100% successful		100	
109C					1							2	1	-1			0						2		1		2			1						2		1		2		14	The Claimant was 100% Successful	100		
109D					0			-2			-1	-1	-1	1			2								2					1				-2		0	1	1				1	The Defendant was 0% successful		0	
110C		-1			1	1						2	1	-1		1			1	-1			2			1	1			1		-1		-2		2	1	1			-1	9	Claimant was 65% successful	65		

Appendix 3   Predictive Model Results

110D		1			0	-1						-1	-1	1		-1			2	2			2			-1	2			1		-2		-2		0		1			-1	2	Defendant was 35% successful		35	
111C					1							2	1	-1			0						2	1		1	2			1						2	1	1		2		16	The Claimant was 80% successful	80		
111D					0						-1	-1	-1	1			2						2	2		-1	2			1				-2		0		1				5	The Defendant was 20% successful		20	
112C					1				-2				1	-1			0		1					1	1		2			1				-2	2	2	1	1				9	The Claimant was 40% successful	40		
112D					0			-2	1				-1	1			2		2					2	2		2			1					2	0	1	1	1			15	The Defendant was 60% successful		60	
113C					1							2	1	-1			0						2	1		1	2			1						2	1	1		2		16	The Claimant was 100% successful	100		
113D					0						-1	-1	-1	1			2						2	2		-1				1				-2		0		1	1			4	The Defendant was 0% successful		0	
114C					1							2	1								1					1				1					2	2		1		2		14	The Claimant was 100% successful	100		
114D					0							-1	-1								-1					-1				1				-2		0	1	1				-3	The Defendant was 0% successful		0	
115C												2	1	-1					1				2	1		1	2			1						2		1			-1	12	The Claimant was 100% successful	100		
115D												-1	-1	1					2					2		-1				1				-2		0	1	1			-1	2	The Defendant was 0% successful		0	
116C					1							2	1								1					1	2			1				-2		2		1				10	The Claimant 100% successful	100		
116D					0			-2			-1	-1	-1								-1					-1				1						0	1	1			-1	-5	The Defendant was 0% successful		0	
117C					1	1	1					2	1	-1					1	-1			2	1		1	2				-1					2		1		2		15	The Claimant was 65% successful	65		
117D					0	-1	0	-2			-1	-1	-1	1					2	2				2		-1	2				-2			-2	2	0	1	1	1			3	The Defendant was 35% successful		35	
118C				1								2									1					1	2			1						2	1	1	1			13	The Claimant was 75% successful	75		
118D				1						-1	-1	-1									-1					-1				1				-2		0						-5	The Defendant was 25% successful		25	
119C					1							2	1	-1					1	-1			2	1		1	2				-1					2	1	1		2		14	The Claimant was 90% successful	90		
119D					0							-1	-1	1					2	2				2		-1					-2			-2	2	0	1	1			-1	3	The Defendant was 10% successful		10	
120C					1				-2	-1		2	1				0						2	1		1	2		2		-1					2	1			2		13	The Claimant was 90% Successful	90		
120D					0			-2	1	-1	-1	-1	-1				2						2	2		-1					-2			-2		0					-1	-5	The Defendant was 10% successful		10	
121C					1				-2			2					0						2	1		1	2			1				-2	2	2	1	1		2		14	The Claimant was 80% successful	80		
121D					0			-2	1			-1					2							2		-1	2			1				-2		0		1	1			4	The Defendant was 20% successful		20	
122C												2	1	-1					1				2	1		1	2			1						2	1	1		2		16	The Claimant was 100% successful	100		
122D								-2				-1	-1	1					2				2	2		-1				1				-2		0		1	1			3	The Defendant was 0% successful		0	
123C					1			-2				2	1	-1			0			-1			2	1	1		2			1						2		1		2		12	The Claimant was 65% successful	65		
123D					0			-2				-1	-1	1			2			2				2	2		1			1						0		1			-1	7	The Defendant was 35% successful		35	
124C		-1			1				-2					-1					1	-1					1	1	2			1				-2		2		1		2		5	The Claimant was 10% successful	10		
124D		1			0				1					1					2	2					2	-1				1						0	1	1			-1	10	The Defendant was 90% successful		90	
125C				1								2	1	-1					1					1	1		2			1					2	2		1			-1	13	The Claimant was 50% successful	50		
125D				1				-2				-1	-1	1					2					2	2		2			1				-2	2	0	1	1			-1	8	The Defendant was 50% successful		50	

Appendix 4 Part 1 Explanatory Model Graph



Appendix 4 Part 2 Predictive Model Data Analysis

Decision No	C	D	D=1.5C+3	D=1.5C-5	D=1.5C-15	<10%			>80	outcome	100	90	80	80	70	60	50	50	40	30	20	10	10	0
1	12	4	21	13	3	-17	-9	1	1						4									
2	8	5	15	7	-3	-10	-2	8	8							5								
3	11	2	19.5	11.5	1.5	-17.5	-9.5	0.5	0.5				2	2										
4	14	0	24	16	6	-24	-16	-6	-6		0													
5	11	5	19.5	11.5	1.5	-14.5	-6.5	3.5	3.5								5	5						
6	16	4	27	19	9	-23	-15	-5	-5		3.9													
7	14	6	24	16	6	-18	-10	0	0		6													
8	16	6	27	19	9	-21	-13	-3	-3		6													
9	8	10	15	7	-3	-5	3	13	13				9.9	9.9										
10	13	1	22.5	14.5	4.5	-21.5	-13.5	-3.5	-3.5		1													
11	13	2	22.5	14.5	4.5	-20.5	-12.5	-2.5	-2.5				1.9	1.9										
12	12	0	21	13	3	-21	-13	-3	-3		0													
13	9	2	16.5	8.5	-1.5	-14.5	-6.5	3.5	3.5				2	2										
14	14	4	24	16	6	-20	-12	-2	-2		4													
15	7	9	13.5	5.5	-4.5	-4.5	3.5	13.5	13.5															9
16	10	18	18	10	0	0	8	18	18															18
17	15	7	25.5	17.5	7.5	-18.5	-10.5	-0.5	-0.5		7													
18	8	1	15	7	-3	-14	-6	4	4							1								
19	11	11	19.5	11.5	1.5	-8.5	-0.5	9.5	9.5										11					
20	13	-1	22.5	14.5	4.5	-23.5	-15.5	-5.5	-5.5		-1													
21	16	7	27	19	9	-20	-12	-2	-2			7												
22	16	4	27	19	9	-23	-15	-5	-5		4.1													
23	10	9	18	10	0	-9	-1	9	9															9
24	4	11	9	1	-9	2	10	20	20													11	11	
25	6	18	12	4	-6	6	14	24	24															18
26	11	10	19.5	11.5	1.5	-9.5	-1.5	8.5	8.5								10	10						
27	13	8	22.5	14.5	4.5	-14.5	-6.5	3.5	3.5				8	8										
28	13	13	22.5	14.5	4.5	-9.5	-1.5	8.5	8.5							13								
29	11	13	19.5	11.5	1.5	-6.5	1.5	11.5	11.5															13
30	3	6	7.5	-0.5	-10.5	-1.5	6.5	16.5	16.5															6
31	14	-1	24	16	6	-25	-17	-7	-7		-1													
32	11	-4	19.5	11.5	1.5	-23.5	-15.5	-5.5	-5.5		-4													
33	13	-4	22.5	14.5	4.5	-26.5	-18.5	-8.5	-8.5		-4													
34	-2	7	0	-8	-18	7	15	25	25															7
35	9	-2	16.5	8.5	-1.5	-18.5	-10.5	-0.5	-0.5		-2													
36	9	0	16.5	8.5	-1.5	-16.5	-8.5	1.5	1.5				0	0										
37	11	-5	19.5	11.5	1.5	-24.5	-16.5	-6.5	-6.5		-5													

38	12	-5	21	13	3	-26	-18	-8	-8		-5													
39	6	4	12	4	-6	-8	0	10	10													4	4	
40	15	-5	25.5	17.5	7.5	-30.5	-22.5	-12.5	-12.5				-5	-5										
41	4	6	9	1	-9	-3	5	15	15															6
42	15	-1	25.5	17.5	7.5	-26.5	-18.5	-8.5	-8.5		-1													
43	3	11	7.5	-0.5	-10.5	3.5	11.5	21.5	21.5															11
44	7	18	13.5	5.5	-4.5	4.5	12.5	22.5	22.5															18
45	8	12	15	7	-3	-3	5	15	15											12				
46	14	2	24	16	6	-22	-14	-4	-4				2.1	2.1										
47	8	10	15	7	-3	-5	3	13	13															10.1
48	5	9	10.5	2.5	-7.5	-1.5	6.5	16.5	16.5												9			
49	15	2	25.5	17.5	7.5	-23.5	-15.5	-5.5	-5.5				2	2										
50	17	11	28.5	20.5	10.5	-17.5	-9.5	0.5	0.5								11	11						
51	7	8	13.5	5.5	-4.5	-5.5	2.5	12.5	12.5						7.9									
52	14	7	24	16	6	-17	-9	1	1							6.9								
53	14	9	24	16	6	-15	-7	3	3						9									
54	8	3	15	7	-3	-12	-4	6	6															3
55	14	-2	24	16	6	-26	-18	-8	-8		-2													
56	14	11	24	16	6	-13	-5	5	5							11								
57	12	2	21	13	3	-19	-11	-1	-1				2	2										
58	14	5	24	16	6	-19	-11	-1	-1			5												
59	7	8	13.5	5.5	-4.5	-5.5	2.5	12.5	12.5													8.1	8.1	
60	5	10	10.5	2.5	-7.5	-0.5	7.5	17.5	17.5										10					
61	14	7	24	16	6	-17	-9	1	1						7.1									
62	15	5	25.5	17.5	7.5	-20.5	-12.5	-2.5	-2.5							5								
63	14	6	24	16	6	-18	-10	0	0				6	6										
64	11	6	19.5	11.5	1.5	-13.5	-5.5	4.5	4.5			6												
65	14	11	24	16	6	-13	-5	5	5			10.9												
66	14	11	24	16	6	-13	-5	5	5						11.1									
67	14	5	24	16	6	-19	-11	-1	-1			5												
68	14	7	24	16	6	-17	-9	1	1						7									
69	14	3	24	16	6	-21	-13	-3	-3		3													
70	11	0	19.5	11.5	1.5	-19.5	-11.5	-1.5	-1.5				0	0										
71	17	8	28.5	20.5	10.5	-20.5	-12.5	-2.5	-2.5								8	8						
72	8	4	15	7	-3	-11	-3	7	7							4								
73	5	9	10.5	2.5	-7.5	-1.5	6.5	16.5	16.5															9
74	14	2	24	16	6	-22	-14	-4	-4				2	2										
75	13	-1	22.5	14.5	4.5	-23.5	-15.5	-5.5	-5.5		-1													
76	7	12	13.5	5.5	-4.5	-1.5	6.5	16.5	16.5												12			
77	16	6	27	19	9	-21	-13	-3	-3		6													
78	14	8	24	16	6	-16	-8	2	2							8								
79	5	10	10.5	2.5	-7.5	-0.5	7.5	17.5	17.5										10					
80	15	6	25.5	17.5	7.5	-19.5	-11.5	-1.5	-1.5		6								10					
81	14	2	24	16	6	-22	-14	-4	-4		2													
82	12	-1	21	13	3	-22	-14	-4	-4		-1													
83	4	7	9	1	-9	-2	6	16	16															7
84	-1	9	1.5	-6.5	-16.5	7.5	15.5	25.5	25.5															9

85	15	1	25.5	17.5	7.5	-24.5	-16.5	-6.5	-6.5		1														
86	11	12	19.5	11.5	1.5	-7.5	0.5	10.5	10.5																
87	9	1	16.5	8.5	-1.5	-15.5	-7.5	2.5	2.5		1									12					
88	12	6	21	13	3	-15	-7	3	3				6	6											
89	15	4	25.5	17.5	7.5	-21.5	-13.5	-3.5	-3.5		4														
90	14	9	24	16	6	-15	-7	3	3						9										
91	8	5	15	7	-3	-10	-2	8	8							5									
92	12	0	21	13	3	-21	-13	-3	-3				0	0											
93	13	2	22.5	14.5	4.5	-20.5	-12.5	-2.5	-2.5				2	2											
94	11	20	19.5	11.5	1.5	0.5	8.5	18.5	18.5																20
95	1	11	4.5	-3.5	-13.5	6.5	14.5	24.5	24.5																11
96	9	-6	16.5	8.5	-1.5	-22.5	-14.5	-4.5	-4.5		-6														
97	8	10	15	7	-3	-5	3	13	13									10	10						
98	6	11	12	4	-6	-1	7	17	17																11
99	11	8	19.5	11.5	1.5	-11.5	-3.5	6.5	6.5				8	8											
100	15	5	25.5	17.5	7.5	-20.5	-12.5	-2.5	-2.5				5	5											
101	16	5	27	19	9	-22	-14	-4	-4				5	5											
102	13	4	22.5	14.5	4.5	-18.5	-10.5	-0.5	-0.5		4														
103	6	15	12	4	-6	3	11	21	21																15
104	14	6	24	16	6	-18	-10	0	0		6														
105	12	3	21	13	3	-18	-10	0	0				3	3											
106	6	16	12	4	-6	4	12	22	22																16
107	13	11	22.5	14.5	4.5	-11.5	-3.5	6.5	6.5							11									
108	4	8	9	1	-9	-1	7	17	17																8
109	14	1	24	16	6	-23	-15	-5	-5		1														
110	9	2	16.5	8.5	-1.5	-14.5	-6.5	3.5	3.5						2										
111	16	5	27	19	9	-22	-14	-4	-4				5	5											
112	9	15	16.5	8.5	-1.5	-1.5	6.5	16.5	16.5											15					
113	16	4	27	19	9	-23	-15	-5	-5		4														
114	14	-3	24	16	6	-27	-19	-9	-9		-3														
115	12	2	21	13	3	-19	-11	-1	-1		2														
116	10	-5	18	10	0	-23	-15	-5	-5		-5														
117	15	3	25.5	17.5	7.5	-22.5	-14.5	-4.5	-4.5						3										
118	13	-5	22.5	14.5	4.5	-27.5	-19.5	-9.5	-9.5				-5	-5											
119	14	3	24	16	6	-21	-13	-3	-3			3													
120	13	-5	22.5	14.5	4.5	-27.5	-19.5	-9.5	-9.5			-5													
121	14	4	24	16	6	-20	-12	-2	-2				4	4											
122	16	3	27	19	9	-24	-16	-6	-6		3														
123	12	7	21	13	3	-14	-6	4	4						7										
124	5	10	10.5	2.5	-7.5	-0.5	7.5	17.5	17.5														10	10	
125	13	8	22.5	14.5	4.5	-14.5	-6.5	3.5	3.5									8	8						

Appendix 4 Part 3 Predictive Model Data and Graph

CLAIMANT	C	10	9	8	7	6	5	4	3	2	1	0
1	12				4							
2	8					5						
3	11			2								
4	14	0										
5	11						5					
6	15.9	3.9										
7	14	6										
8	16	6										
9	7.9			9.9								
10	13	1										
11	12.9			1.9								
12	12	0										
13	9			2								
14	14	4										
15	7											9
16	10											18
17	15	7										
18	8					1						
19	11							11				
20	13	-1										
21	16		7									
22	16.1	4.1										
23	10											9
24	4										11	
25	6											18
26	11						10					
27	13			8								
28	13					13						
29	11											13
30	3											6
31	14	-1										
32	11	-4										
33	13	-4										
34	-2											7
35	9	-2										
36	9			0								
37	11	-5										
38	12	-5										
39	6										4	
40	15			-5								
41	4											6
42	15	-1										
43	3											11
44	7											18
45	8								12			
46	13.1			2.1								
47	8.1											10.1
48	5									9		
49	15			2								
50	17						11					
51	6.9				7.9							
52	13.9					6.9						
53	14				9							
54	8											3
55	14	-2										
56	14					11						
57	12			2								
58	14		5									
59	7.1										8.1	
60	5							10				
61	14.1				7.1							
62	15					5						
63	14			6								
64	11		6									
65	13.9		10.9									
66	14.1				11.1							
67	14		5									
68	14				7							
69	14	3										
70	11			0								
71	17						8					
72	8					4						
73	5											9
74	14			2								
75	13	-1										
76	7									12		
77	16	6										
78	14					8						
79	3							10				
80	15	6										
81	14	2										
82	12	-1										
83	4											7
84	-1											9
85	15	1										
86	11							12				
87	9	1										
88	12			6								
89	15	4										
90	14				9							
91	8					5						
92	12			0								
93	13			2								
94	11											20
95	1											11
96	9	-6										
97	8						10					
98	6											11
99	11			8								
100	15			5								
101	16			5								
102	13	4										
103	6											15
104	14	6										
105	12			3								
106	6											16
107	13					11						
108	4											8
109	14	1										
110	9				2							
111	16			5								
112	9							15				
113	16	4										
114	14	-3										
115	12	2										
116	10	-5										
117	15				3							
118	13			-5								
119	14		3									
120	13		-5									
121	14			4								
122	16	3										
123	12				7							
124	5										10	
125	13						8